Supreme Court, U.S.
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No. 92-1070

In The
Supreme Court of the United States
October Term, 1992

IN RE CRAIG TWEEDY,

Petitioner.

**On Petition For Writ Of Mandamus
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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ISSUES PRESENTED IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

1. The Petition for Writ of Mandamus should not be granted. Petitioner's papers do not meet the requirements of Rule 20.1, Rules of the Supreme Court, that in order to justify the granting of the Writ, (i) the Writ will be in the aid of the Court's appellate jurisdiction, (ii) there are present exceptional circumstances warranting exercise of the Court's discretionary powers, and (iii) adequate relief cannot be obtained in any other form or from any other Court.

2. The Petition for Writ of Mandamus should be denied. The subject matter described in the Petition, relating to a March 31, 1992 injunction entered by the District Court enjoining Petitioner from relitigating issues already decided below, is the subject of a *pending* appeal before the United States Court of Appeals for the Tenth Circuit, styled *American Airlines, Plaintiff-Appellee, v. Craig Tweedy, Defendant-Appellant,* Appeal No. 92-5159. Mandamus should not be used as a substitute for appeal.

3. The Petition for Writ of Mandamus should be denied. A mandamus action is not the proper vehicle to relitigate the already closed issues decided in *Graham I, Graham II* and *Graham IV*.

LIST OF INTERESTED PARTIES

Respondent, American Airlines, Inc., is a wholly-owned subsidiary of AMR Corporation, a publicly-traded Delaware corporation with its principal place of business in Texas. American has no non-wholly owned subsidiaries.

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No. 92-1070

In The

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IN RE CRAIG TWEEDY,

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On Petition For Writ Of Mandamus To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

The Respondent, American Airlines, Inc. respectfully prays that this Court deny the Petition for Writ of Mandamus.

JURISDICTION

A Petition for Writ of Mandamus was filed by Craig Tweedy pursuant to 28 U.S.C. § 1651(a). The Respondent, American Airlines, Inc. ("AMERICAN"), received a copy of the Petition for Writ of Mandamus on December 17, 1992, and this Brief in Opposition is timely filed as provided by Rule 20 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

The Petition for Writ of Mandamus is the latest installment in what has become known in the Courts below as the *"Graham Litigation."* This litigation originated when one Lillian A. Graham ("GRAHAM"), a female aircraft mechanic and former employee of AMERICAN, sued AMERICAN for sex discrimination and harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The Petitioner, Craig Tweedy ("TWEEDY"), acted as GRAHAM's attorney of record in the *Graham Litigation*. With the filing of the instant action, the *Graham Litigation* consists of no less than seven (7) separate actions, tabulated as follows:

- *"Graham I"* is *Lillian Graham v. American Airlines, Inc.*, Case No. 86-C-516-C, U.S.D.C., N.D. Okla., 731 F.Supp. 1494 (N.D. Okla. 1989), in which AMERICAN was granted judgment on GRAHAM's Title VII claim.

- *"Graham II"* is *Lillian Graham v. American Airlines, Inc., et al.*, Case No. 89-C-815-P, U.S.D.C., N.D. Okla., in which AMERICAN was granted summary judgment on the grounds of issue and claim preclusion arising from *Graham I.*

- *"Graham III"* is *Lillian Graham v. American Airlines, Inc., et al.*, Case No. CJ-91-04125, Dist. Ct., Tulsa County, State of Oklahoma, in which AMERICAN was granted summary judgment on the grounds of issue and claim preclusion arising from *Grahams I, II* and *IV*.

- In response to *Graham III*, AMERICAN filed *"Graham IV"* against both GRAHAM and her attorney, TWEEDY, on September 27, 1991,

styled *American Airlines, Inc. v. Craig Tweedy and Lillian Graham*, Case No. 91-C-762-C, U.S.D.C., N.D. Okla. On March 31, 1992, the District Court entered an injunction enjoining GRAHAM and TWEEDY from relitigating claims and issues already decided in *Grahams I* and *II*, which TWEEDY has appealed to the Tenth Circuit and is ***pending*** as Appeal No. 92-5159.

- *"Graham V"* is a Petition for Writ of Mandamus and Prohibition filed by GRAHAM and TWEEDY on January 17, 1992, in the Tenth Circuit Court of Appeals styled *Craig Tweedy and Lillian Graham v. Honorable Thomas R. Brett, United States District Judge*, Case No. 92-5011, in which Petitioners unsuccessfully sought to disqualify the District Judge to whom *Graham IV* was assigned.

- *"Graham VI"* is a *Second* Petition for Writ of Mandamus filed by GRAHAM and TWEEDY on May 28, 1992, in the Tenth Circuit again styled *Craig Tweedy and Lillian Graham v. Honorable Thomas R. Brett, United States District Judge*, Case No. 92-5107, in which Petitioners unsuccessfully sought review of the March 31, 1992 injunction entered in *Graham IV*.

- *"Graham VII"* is the instant Petition for Writ of Mandamus filed in this Court in which TWEEDY seeks review of *Graham IV* and *Graham VI*.

A chart has been provided which depicts the long history of the *"Graham Litigation."* (Respondent's App. at pp. 1-7).

On August 14, 1992, GRAHAM and AMERICAN entered into a settlement of all their litigation. All of GRAHAM's *individual* litigation, including Appeal No. 92-5159, has terminated. (Respondent's App. at p. 56).

On January 15, 1993, the three resident District Judges of the Northern District of Oklahoma entered an Order and Findings of Fact suspending TWEEDY from the practice of law before the Federal Court for three (3) years because of vexatious litigation tactics in the *Graham Litigation* and other matters. (Respondent's App. at pp. 63-71). A similar complaint for discipline was filed by the Oklahoma Bar Association and is pending before the Supreme Court of Oklahoma. A brief summary of the *Graham Litigation* will demonstrate TWEEDY's vexatious litigation tactics.

HISTORY OF THE *GRAHAM LITIGATION*

A. Chronology of *Graham I*

1. Origin of *Graham I*

On May 23, 1986, GRAHAM filed her Complaint in *Graham I* alleging two claims: (1) a claim for sex discrimination and sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"); and (2) a state tort claim for the intentional infliction of emotional distress. One of the assertions made by GRAHAM was that a work discipline she received for damaging a 4th stage turbine disk, while deblading the turbine ("the disk discipline"), was a pretext for sex discrimination. The disk and engine from which it was

removed was owned by a private travel firm called "Ports of Call." On March 18, 1987, the Court granted AMERICAN partial summary judgment on GRAHAM's state tort claim, concluding that GRAHAM's tort claim was preempted by the Railway Labor Act, 29 U.S.C. § 151 *et seq.*

2. August 11, 1989 Judgment in *Graham I* And Dismissal Of *Graham I* Appeal No. 89-5159

On August 11, 1989, the District Court entered its Findings of Fact, Conclusions of Law and Judgment. (Respondent's App. at pp. 8-30). The Honorable H. Dale Cook, District Judge, found that GRAHAM had received seventeen separate disciplines for rule violations while employed at AMERICAN. The "disk discipline" was not the first nor the last (the terminating event), but was only one of many. The decision in *Graham I* is reported at *Lillian Graham v. American Airlines, Inc.*, 731 F.Supp. 1494 (N.D. Okla. 1989). In paragraphs 30, 32 and 41 of the Findings of Fact, Judge Cook resolved the fact issues concerning the "disk discipline" adverse to GRAHAM. (Respondent's App. at pp. 16-20). On September 11, 1989, GRAHAM filed her Notice of Appeal to the Tenth Circuit from the Judgment in *Graham I*, docketed as Appeal No. 89-5159. However, on August 7, 1990, GRAHAM voluntarily filed her Application to Withdraw Appeal, and on August 10, 1990, **the Tenth Circuit dismissed her direct appeal from *Graham I*.**

3. GRAHAM's August 9, 1990 Motion For Relief from *Graham I*

On August 9, 1990, GRAHAM filed a Rule 60(b), Fed.R.Civ.P., motion for relief from the judgment in *Graham I* on the grounds of "newly discovered evidence" and "fraud" which GRAHAM argued showed that the "disk discipline" was fabricated.

4. Denial by the Court of GRAHAM's Motion for Relief

On December 13, 1990, Judge Cook entered an Order denying GRAHAM's Motion for Relief. (Respondent's App. at p. 31).

5. GRAHAM's Rule 60(b) Appeal No. 91-5060

After several motions to reconsider were denied, on April 5, 1991, GRAHAM filed an appeal from the denial of her Rule 60(b) Motion. On January 17, 1992, GRAHAM **voluntarily** filed a Motion to Dismiss Appeal No. 91-5060, and on January 21, 1992, the Tenth Circuit dismissed Appeal No. 91-5060. On April 7, 1992, the Tenth Circuit granted AMERICAN's Motion for Sanctions, and remanded the case to the District Court to determine the amount and to apportion the amount between GRAHAM and TWEEDY. (Respondent's App. at p. 46). This sanction matter is pending in *Graham I*.

B. Chronology of *Graham II*

1. Origin of *Graham II*

On September 8, 1989, GRAHAM commenced a second action in State Court, *"Graham II"*, which AMERICAN removed to the Federal Court as Case No. 89-C-815-P, U.S.D.C., N.D. Okla.

2. Claims and Issues Raised by GRAHAM in *Graham II*

GRAHAM alleged in *Graham II* that the judgment in *Graham I* was the result of engine records fraud involving the "disk discipline," perjury by AMERICAN's witnesses and a conspiracy among AMERICAN, its agents and employees, George Barton and Ken Harding, and GRAHAM's union, the Transport Workers Union, and its agent, Dennis Quish, to deprive GRAHAM, through fraud and deceit, of her employment with AMERICAN.

3. The February 2, 1992 Summary Judgment in Favor of AMERICAN in *Graham II*

On February 21, 1991, the Honorable Layn R. Phillips, District Judge, entered summary judgment in favor of AMERICAN and the other Defendants in *Graham II* on, among other grounds, the claim and issue preclusive effect of *Graham I*. (Respondent's App. at p. 35). **GRAHAM did not appeal *Graham II*.**

C. Chronology of *Graham III*

1. Origin of *Graham III*

On September 10, 1991, GRAHAM filed *Graham III* in State Court. (Petitioner's App. at p. 57-79).

2. Claims and Issues Raised by GRAHAM in *Graham III*

In *Graham III*, GRAHAM alleged once again that AMERICAN committed "fraud" against GRAHAM in *Graham I* (and apparently *Graham II*) with regard to the "disk discipline" when AMERICAN "fraudulently represented" that GRAHAM damaged the Ports of Call disk in 1985 and "fraudulently concealed" the fact that the disk had been overhauled in 1982 and not in 1985.

3. The August 31, 1992 Summary Judgment In Favor of AMERICAN in *Graham III*

On August 31, 1992, State Court Judge, the Honorable Donald Lane, granted AMERICAN summary judgment against GRAHAM in *Graham III*. (Respondent's App. at p. 58). **No appeal was filed.**

D. Chronology of *Graham IV*

1. Origin of *Graham IV*

In response to *Graham III*, on September 27, 1991, AMERICAN filed a complaint for an injunction, Case No. 91-C-762-B, *"Graham IV"*, seeking to enjoin GRAHAM and TWEEDY from further relitigating in *Graham III* the

claims and issues relating to the "disk discipline" which had been litigated in *Grahams I* and *II*. (Petitioner's App. at p. 80-116).

2. The March 31, 1992 Injunction in Graham IV Against TWEEDY and GRAHAM

On March 31, 1992, the Honorable Thomas R. Brett, District Judge, entered an injunction against GRAHAM and TWEEDY in *Graham IV* enjoining them from (i) further relitigation of the same claims and issues already litigated in *Graham I* and *Graham II*, including matters relating to the "disk discipline," and (ii) enjoining TWEEDY and GRAHAM from litigating in *Graham III*. (Petitioner's App. "A"). Judge Brett further found that the conduct of TWEEDY was vexatious and multiplicious and that sanctions should be awarded against TWEEDY. After a hearing as to the amount of sanctions before a Magistrate Judge (to which TWEEDY did not respond and at which TWEEDY did not appear), Judge Brett entered judgment against TWEEDY for $40,333.02. (Respondent's App. at pp. 49-53). TWEEDY has not paid the judgment.

3. Appeal No. 92-5159 From The March 31, 1992 Injunction in *Graham IV*

On August 13, 1992, TWEEDY filed a Notice of Appeal from (i) the March 31, 1992 Judgment, and (ii) the July 13, 1992 Judgment for Sanctions. (Respondent's App. at p. 54). On January 26, 1993, **the Tenth Circuit dismissed that part of the appeal in *Graham IV***, Case No.

92-5159, pertaining to the July 13, 1992 sanction judgment, thus affirming the sanction judgment. (Respondent's App. at p. 60). That part of the appeal still pending in *Graham IV*, No. 92-5159, pertains to the March 31, 1992 injunction. (Respondent's App. at p. 72).

E. Chronology of *Graham V*

On January 17, 1992, GRAHAM and TWEEDY filed a Petition for Writ of Mandamus and Prohibition in the Tenth Circuit styled *Craig Tweedy and Lillian Graham v. Honorable Thomas R. Brett*, Case No. 92-5011, *Graham V*, after Judge Brett denied TWEEDY's motion to disqualify him. On March 5, 1992, the Tenth Circuit denied the Petition in *Graham V*.

F. Chronology of *Graham VI*

On May 28, 1992, GRAHAM and TWEEDY filed a *Second* Petition for Writ of Mandamus in the Tenth Circuit styled *Craig Tweedy and Lillian Graham v. Honorable Thomas R. Brett*, Case No. 92-5107, *"Graham VI"*, in which GRAHAM and TWEEDY asked that the Tenth Circuit vacate the March 31, 1992 injunction entered in *Graham IV*. On June 15, 1992, the Tenth Circuit denied the Petition for Mandamus. (Petitioner's App. "B"). On September 14, 1992, the Tenth Circuit denied GRAHAM and TWEEDY's Petition for Rehearing and for Rehearing En Banc. (Petitioner's App. "C"). Also, on September 14, 1992, the Tenth Circuit granted AMERICAN's Motion for Sanctions

and ordered TWEEDY to "remit $1,500.00 to Real Party in Interest AMERICAN as a monetary penalty." (Petitioner's App. "D"). TWEEDY has not paid the judgment.

G. Chronology of *Graham VII*

On December 11, 1992, TWEEDY filed the instant Petition for Writ of Mandamus asking that this Court (i) direct the "covert circuit tyrants" (Petitioner's Brief at p. 54) of the Tenth Circuit to reconsider its order denying mandamus in *Graham VI*, and (ii) order Judge Brett to vacate the March 31, 1992 injunction entered in *Graham IV*.

SUMMARY OF THE ARGUMENT

The remedy of mandamus is a drastic and extraordinary writ reserved for genuinely extraordinary cases. Petitioner's papers simply do not show that this is such a case. The only thing extraordinary about this case is TWEEDY's vexatious and multiplicative litigation tactics. Indeed, what TWEEDY's papers do show is that he is seeking to relitigate before this Court the merits of the "disk discipline." (Petitioner's Petition at pp. 10-24). TWEEDY continues to litigate, *even after* his client, GRAHAM, has settled with AMERICAN and has terminated the litigation. In fact, TWEEDY is litigating the same issue, even now, in the pending appeal from the March 31, 1992 injunction entered in *Graham IV*, in the Tenth Circuit in Case No. 92-5129. Thus, not only does TWEEDY fail to satisfy the requirements of Rule 20, Rules

of Supreme Court, in order to justify issuance of a writ, but also he is attempting to use this Petition for Writ of Mandamus as a substitute, or more accurately, as a duplicate for his pending appeal. The Petition should be denied.

REASONS FOR DENYING THE WRIT

A. PETITIONER HAS NOT SHOWN THAT HE IS ENTITLED TO A WRIT OF MANDAMUS UNDER 28 U.S.C. § 1651(a) AND RULE 20, RULES OF SUPREME COURT.

Petitioner's papers do not show that this is a case for the issuance of a writ of mandamus pursuant to 28 U.S.C. § 1651(a). 28 U.S.C. § 1651(a) provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The issuance by this Court of an extraordinary writ pursuant to 28 U.S.C. § 1651(a) "is not a matter of right, but of discretion sparingly exercised." Rule 20, Rules of Supreme Court. Much of the jurisprudence governing the issuance of a writ of mandamus has been codified in Rule 20, Rules of Supreme Court. Under the Rule, in order to justify the granting of a writ, a petitioner must show that:

- The writ will be in aid of the Court's appellate jurisdiction.

- There are present exceptional circumstances warranting exercise of the Court's discretionary powers.

- That adequate relief cannot be obtained in any other form or from any other court.

None of these elements are present here. In fact, the traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 308-10, 109 S.Ct. 1814, 1822, 104 L.Ed.2d 318 (1989), *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943). *See also Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661, 98 S.Ct. 2552, 2556, 57 L.Ed.2d 504 (1978); *Kerr v. United States District Court*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976); *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305 (1967). Although this Court has not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," *Kerr v. United States District Court*, 426 U.S. at 402, 96 S.Ct. at 2124; *see Will v. United States*, 389 U.S. at 95, 88 S.Ct. at 273, the Court has required that a petitioner demonstrate a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953), or conduct amounting to "usurpation of [the judicial] power," *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566 (1945), to be entitled to issuance of the writ. To ensure

that mandamus remains an extraordinary remedy, a petitioner must show that he lacks an adequate alternative means to obtain the relief he seeks, *see, e.g., Kerr v. United States District Court*, 426 U.S. at 403, 96 S.Ct. at 2124; *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980) (*per curiam*), and carry "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Casualty Co. v. Holland*, 346 U.S. at 384, 74 S.Ct. at 148, quoting *United States v. Duell*, 172 U.S. 576, 582, 19 S.Ct. 186, 287, 43 L.Ed. 559 (1899). When these principles are applied to this case, it is evident that TWEEDY does not even come close to meeting this demanding standard.

At the threshold, however, it is necessary to identify what actions in the Courts below TWEEDY contends justify this Court's issuance of mandamus. From a careful reading of the Petition, TWEEDY appears to be asking this Court to issue a writ of mandamus (i) directing the "covert circuit tyrants" of the Tenth Circuit to again consider his Petition for Mandamus in *Graham VI*, which sought review of the March 31, 1992 injunction entered in *Graham IV*, and (ii) ordering Judge Brett to vacate the March 31, 1992 injunction entered in *Graham IV*. In sum, TWEEDY asks this Court, by writ of mandamus, to:

> [D]irect the sound duties of the Court of Appeals and all of its judges render [sic], *en banc*, cogent findings and reasoning in compliance with the intent of the Anti-Injunction Act, dictates against fraud, Federal Rules and Due Process Clause settled by the Supreme Court.
>
> As above suggested, such direction would bring corrective attention to the record fiats and due process abuses and appearance, or probability

> of the select means and covert tyrants within such Court. Such dominoe affects [sic] would be most fair and just.

TWEEDY further asks this Court:

> In the alternative, a writ of mandamus is urged directing Thomas R. Brett, the United States District Judge below, to exercise his clear and peremptory duties to vacate the entirety of his March 31, 1992 Order and to dismiss the matter below in District Court Case No. C-762-C [sic].

(Petitioner's Brief at pp. 47-48).

Turning now to the requirements of Supreme Court Rule 20, it is clear that none of TWEEDY's wild allegations support his Petition for Writ of Mandamus.[1] First, with regard to the requirement that the Writ be "in aid of the Court's appellate jurisdiction," it is not immediately apparent that TWEEDY is even contending in his papers that Judge Brett in *Graham IV* or the "covert circuit tyrants" in the Tenth Circuit acted beyond their "jurisdiction." At most, TWEEDY contends that they were wrong in *Graham IV* and *Graham VI*. Moreover, it is evident that **both** the District Court and the Tenth Circuit had and have jurisdiction of the subject matter in *Graham IV* and *Graham VI* and of the person of the Petitioner and that it was necessary in the litigation for Judge Brett to rule on

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[1] Indeed, at no time has TWEEDY presented any proof whatsoever in support of his fanciful allegation that the Court of Appeals or any of the District Judges involved in the *Graham Litigation* have acted fraudulently or improperly. On the contrary, all of the Judges have been far more patient with TWEEDY than AMERICAN or any other private litigant in similar circumstances would have liked.

AMERICAN's complaint for an injunction in *Graham IV*. *Bankers Life & Casualty v. Holland*, 346 U.S. 379, 382, 74 S.Ct. 145, 147, 98 L.Ed. 106 (1953).

At the very most, and giving TWEEDY's paper the benefit of the doubt, TWEEDY appears to be arguing that in acting on AMERICAN's complaint and entering the March 31, 1992 injunction in *Graham IV*, Judge Brett exceeded his legal and equitable powers and this error ousted him of jurisdiction. But jurisdiction does not run the gauntlet of reversible errors. *Id.* at p. 382. The rulings on questions of fact and law presented in AMERICAN's complaint in *Graham IV* were made in the course of the exercise of the Court's jurisdiction to decide issues properly before it. The District Court's decision against Petitioner, even if erroneous, involved no abuse of judicial power and is reviewable in the appeal of *Graham IV*. Likewise, the Tenth Circuit's denial of *Graham VI*. See also *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943). The rulings in *Graham IV* and *Graham VI* do not justify mandamus. Therefore, the first element for issuance of mandamus is absent.

Second, there is no showing whatsoever of any exceptional circumstances warranting exercise of this Court's discretionary powers. Both the District Court and the Tenth Circuit have on numerous occasions carefully considered the facts and issues presented by the *Graham Litigation* in *Grahams I, II* and *IV* as well as in the two mandamus proceedings in the Tenth Circuit. *U.S. v. Griesa*, 481 F.2d 275, n. 2 at p. 278 (2nd Cir. 1973) (supervisory mandamus is particularly ill suited as a method of policing a District Court's decisions that turn on issues of fact). The Court's discretion to deny writs is often

reflected in statements that the writ should issue only if petitioner meets the burden of showing that the right to issuance of the writ is "clear and indisputable." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. at 383, 74 S.Ct. at 148. AMERICAN submits that, rather than showing any usurpation of power justifying the granting of the writ, both the District Courts and Court of Appeals, have been *right* and *correct* in their rulings in the *Graham Litigation*. Petitioner does not show a "clear and indisputable right" to the writ. Petitioner has utterly failed to present exceptional circumstances.

Finally, adequate relief for TWEEDY in *Graham IV* is obtainable under ordinary remedies of appeal. Petitioner has, in fact, appealed the March 31, 1992 injunction entered in *Graham IV* to the Tenth Circuit in Case No. 92-5159. Thus, Petitioner is availing himself of appellate review.[2] It should be pointed out that GRAHAM has settled her claim against AMERICAN and has terminated her litigation against AMERICAN. Since it was GRAHAM's claim that was the underlying basis of *Graham III* and TWEEDY was only acting as her counsel, it would seem that TWEEDY's objection to the March 31, 1992 injunction is moot. As to GRAHAM, the *Graham Litigation* is over. The only matters remaining are the sanction matters against TWEEDY. Whatever is left is

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[2] It is fundamental that extraordinary writs cannot be used as substitutes for appeal. *Ex Parte Fahey*, 332 U.S. 258, 259-260, 67 S.Ct. 1558-1559, 91 L.Ed. 2041 (1947) (extraordinary writs should be resorted to only where appeal is a clearly inadequate remedy). "Extraordinary writs . . . may not be used to thwart the congressional policy against piecemeal appeals." *Parr v. U.S.*, 351 U.S. 513, 76 S.Ct. 912, 100 L.Ed.2d 1377 (1956).

reviewable in *Graham IV* currently on appeal to the Tenth Circuit. Because adequate relief is available to Petitioner in his Appeal from *Graham IV*, No. 92-5159, the Petition for Writ of Mandamus should be denied.

In short, none of the elements required by Rule 20, Rules of Supreme Court, are present here and the Writ should be denied.

B. THE PETITION FOR MANDAMUS IS AN IMPROPER ATTEMPT BY TWEEDY TO OBTAIN AN EXTRAORDINARY WRIT AS A SUBSTITUTE FOR APPEAL AND RELITIGATE ISSUES ALREADY DECIDED IN *GRAHAM I, GRAHAM II* AND *GRAHAM IV.*

As shown by the Statement of the Case, an inordinate amount of litigation has followed Judge Cook's original judgment in *Graham I.* AMERICAN wants to make one thing absolutely clear. TWEEDY has never presented any proof whatsoever that the judgments against GRAHAM were based on fraud, or that the factual findings in *Grahams I* and *IV* that GRAHAM damaged the disk were the result of fraud. The fact that GRAHAM damaged the disk has been preclusively decided.

Furthermore, TWEEDY never completed on behalf of GRAHAM any appeal of the judgments below. TWEEDY either failed to appeal the adverse judgments (as in *Grahams II* and *III*) or dismissed the appeal in midstream (as in *original Graham I* and the Rule 60(b) denial in *Graham I*). *Only now,* at the very stroke of midnight, is

TWEEDY apparently pursuing an appeal in *Graham IV*. Clearly, review of this matter by way of mandamus at this late date is inappropriate.

As noted by Judge Brett in *Graham IV* in considering to impose sanctions against TWEEDY pursuant to 28 U.S.C. § 1927:

> The Court views the pending state court proceeding as essentially vexatious and baseless, the issues therein having been resolved against Graham in Graham I and Graham II. Part of the Court's view is shaped by the fact the [sic] Graham, while strongly protesting alleged wrongs committed against her at the hands of American and others, has never completed an appeal of the adverse decision in either Graham I and Graham II to the Tenth Circuit Court of Appeals.
>
> * * *
>
> It occurs to the Court that a party litigant who alleges such deliberate maligning and intrigue being practiced upon her would surely sound out her grievances in a higher court, having achieved no satisfactory results at the District level. Further, it is obvious that Graham is not intimidated by the prospect of more litigation, which sometimes chills a litigant's appeal decision.

(Petitioner's App. "A" at p. 21).

It is obvious that TWEEDY is simply trying to relitigate the disk discipline issue already decided against GRAHAM and TWEEDY in *Grahams I, II* and *IV*. TWEEDY has argued throughout, as justification for his

continuing to litigate the "disk discipline," that he "discovered" in November, 1990, after the judgment in *Graham I*, that the disk was "repaired" in 1982 and *not* 1985.[3] Therefore, TWEEDY argues, GRAHAM could not have damaged the disk in 1985 and AMERICAN's assertion at the trial of *Graham I* that she did was false. TWEEDY argues that the "fact" of the "1982 repair – no 1985 repair" was not litigated or decided in *Grahams I, II* or *IV* and it was error for the District Court in *Graham IV* in the March 31, 1992 Order to enjoin TWEEDY and GRAHAM from further relitigating the issue in *Graham III* pursuant to the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. TWEEDY does concede that "the fact issues and claims [which] were decided against her by the District Court" in *Graham I* "including a finding of her 1985 work damage to turbine disc [sic] S/N 9B6198 (Appendix A at 3-4), [is] one damage element to her State Court fraud claim." (Petitioner's Brief at p. 12).

AMERICAN submits that TWEEDY continues to miscomprehend the scope of claim and issue preclusion. As stated by Judge Phillips in *Graham II* (Respondent's App. at p. 35), granting AMERICAN summary judgment, and quoting from *Ten Mile Industrial Park v. Western Plains Service Corp.*, 810 F.2d 1518, 1523 (10th Cir. 1987):

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[3] The truth is, the engine was "repaired" both in *1982* and in *1985*. The 1982 repair was the result of AMERICAN selling a Boeing 707 aircraft to Ports of Call. The engine in which the disk was installed was overhauled as part of the sale. The 1985 engine repair was the result of Ports of Call sending the engine back to AMERICAN after a report of engine "vibration" during operation. In the process of the 1985 repair, GRAHAM damaged the disk.

> Under the doctrine of res judicata (claim preclusion) 'a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.' *Id.* at 1522 (quoting *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n. 5 (1979)). The doctrine 'bars relitigation of issues that were or *could have been raised* in the first action.' *Id.* at 1522-23 (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1180)) (emphasis added).
>
> * * *
>
> Under the doctrine of collateral estoppel (issue preclusion), 'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.' *Ten Mile Industrial Park*, 810 F.2d at 1523 (quoting *Allen*, 449 U.S. at 94).

Just as Judge Phillips held in *Graham II* and Judge Brett held in *Graham IV*, relitigation of the "disk discipline" is barred by both claim and issue preclusion. Clearly, Judge Cook in *Graham I* specifically found that GRAHAM damaged the disk in 1985 and again in *Graham IV*, Judge Brett found that GRAHAM damaged the disk in 1985. (Respondent's App. at pp. 16-17 and Petitioner's App. "A" at pp. A-12-13). That fact has been decided not once, but twice. Further, TWEEDY's Rule 60(b) Motion to Vacate the *Graham I* judgment on the ground of "newly discovered evidence" and "fraud," *i.e.* that the 1985 disk damage did not occur, was rejected by Judge Cook in the December 13, 1990 Order entered in *Graham I* denying the Rule 60(b) motion to vacate. (Respondent's App. at p. 31).

In the March 31, 1992 injunction entered in *Graham IV*, Judge Brett found:

> In this matter, the Court concludes the gravamen of Graham's pending state court proceeding is that the repair of, and therefore the damage to, the 4th stage turbine disk of the Ports of Call engine occurred in 1982 and could not have occurred in 1985 as found by Judge Cook in Graham I. This Court concludes from the evidentiary hearing and the present pleadings and also the pleadings of Graham I (including the record), Graham II and Graham III, that this is the precise issue around which the various allegations of fraud, perjury and record forging are layered. The Court further concludes that Graham's claims and issues in Graham III are barred by the doctrine of *res judicata* and collateral estoppel from Graham I and II.

(Petitioner's App. "A" at pp. 19-20). Based on this finding, the Court entered an injunction enjoining GRAHAM and TWEEDY from further litigating in *Graham III* and from further instigating against AMERICAN any further proceeding, in either state or federal court or any court or administrative tribunal, on these same claims and/or issues.

The March 31, 1992 injunction barring further relitigation of the issue was appropriate under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684, 1689, 100 L.Ed.2d 127 (1988). TWEEDY has no basis to complain that his former client, GRAHAM, did not have her day in Court on the issue.

Even the courts below have grown tired of TWEEDY's vexatiousness. For example, the Tenth Circuit, in its April 7, 1992 Order remanding Appeal No. 92-5060 (pertaining to the Rule 60(b) in *Graham I* appeal which TWEEDY dismissed), stated in pertinent part:

> The record in this case is replete with multiple and vexatious filings by plaintiff, including a previous appeal to this Court filed and voluntarily dismissed by plaintiff. We have reviewed the record, but plaintiff's litigation before the district court consisted of filings so numerous and multiplicative that we will not attempt to recap the proceedings. Pursuant to statutory authority, as well as the Court's inherent power to deter frivolous and abusive litigation, we have determined that sanctions are appropriate in this case.

(Respondent's App. at p. 46) (footnote omitted).

AMERICAN submits that TWEEDY's Petition for Writ of Mandamus is simply another attempt to relitigate vexatiously the issues already litigated in *Grahams I, II* and *IV*. The Petition should be denied.

CONCLUSION

The Petition for Writ of Mandamus should be denied. TWEEDY has not made the showing required by Rule 20, Rules of the Supreme Court, to justify the issuance of a writ of mandamus to either the Tenth Circuit or the District Court. Further, the Writ should be denied because the subject matter described in TWEEDY's Petition is the subject of the pending appeal from *Graham IV* in the

Tenth Circuit, Case No. 92-5159. Mandamus should not be a substitute for appeal.

Respectfully submitted,

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February 22, 1993

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DATE	GRAHAM I Case No. 86-C-516-C (N.D. Okl.)	GRAHAM II Case No. 89-C-815-P (N.D. Okl.)	GRAHAM III Case No. CJ-91-4125 (Tulsa County)	GRAHAM IV Case No. 91-C-762-B (N.D. Okl.)	GRAHAM V Case No. 92-5011 (10th Cir.)	GRAHAM VI Case No. 92-5107 (10th Cir.)
1986						
• 5/23/86	Complaint Filed *(by Graham)*					
1987						
• 3/18/87	Judgment entered for A.A. on 2nd cause of action *(by Court)*					
• 12/28/87	Entry of Appearance on behalf of Graham *(by Tweedy)*					
1988						
• 4/25/88	Motion to Reconsider 3/18/87 Judgment on 2nd cause of action *(by Tweedy)*					
• 5/5/88	Order Denying Motion to Reconsider *(by Court)*					
• 5/11/88	Commencement of Non-Jury Trial					
• 5/24/88	Suspension of Non-Jury Trial *(by Court)*					

	GRAHAM I	GRAHAM II	GRAHAM III	GRAHAM IV	GRAHAM V	GRAHAM VI
1989						
• 3/13/89	Cont'd Non-Jury Trial					
• 8/11/89	Findings of Fact/ Conclusions of Law filed *(by Court)*					
• 9/8/89		Petition filed (by Tweedy)				
• 9/11/89	Notice of Appeal to the Tenth Circuit *(by Tweedy)*					
• 10/2/89		Notice of Removal to federal court *(by A.A.)*				
1990						
• 6/13/90		Amended Complaint filed *(by Tweedy)*				
• 7/6/90		Motion for Summary Judgment filed *(by A.A.)*				
• 8/9/90	Rule 60(b) Motion filed *(by Tweedy)*					
• 8/10/90	Tenth Circuit Appeal Dismissed *(by Tweedy)*					
• 9/20/90		A.A. Motion for Summary Judgment granted *(by Court)*				
• 11/21/90	Application for Leave to File Supp. Brief with Newly Discovered Evidence					

	GRAHAM I	GRAHAM II	GRAHAM III	GRAHAM IV	GRAHAM V	GRAHAM VI
• 12/13/90	Rule 60(b) Motion Denied *(by Court)*					
• 12/24/90	Motion for Reconsideration filed *(by Tweedy)*					
1991						
• 1/15/91	Motion for Reconsideration denied *(by Court)*					
• 2/11/91	Motion for Clarification of 12/13/90 Order filed *(by Tweedy)*					
• 2/21/91		Final Judgment in favor of A.A. *(by Court)*				
• 2/27/91	Order denying Motion for Clarification *(by Court)*					
• 3/11/91	Motion for Reconsideration filed *(by Tweedy)*					
• 3/18/91	Motion for Reconsideration denied *(by Court)*					
• 4/5/91	Notice of Appeal of 2/27 & 3/18 Orders filed *(by Tweedy)*					

	GRAHAM I	GRAHAM II	GRAHAM III	GRAHAM IV	GRAHAM V	GRAHAM VI
• 9/10/91			Petition filed *(by Tweedy)*			
• 9/27/91				Complaint filed against Graham & Tweedy *(by A.A.)*		
• 12/5/91			Order Staying all proceedings pending decision in Graham IV *(by Judge Lane)*			
1992						
• 1/17/92					Petition for Writ of Mandamus and Prohibition filed *(by Tweedy)*	
• 2/7/92	*Tenth Circuit* Motion for Sanctions for filing a frivolous appeal *(by A.A.)*					
• 3/3/92					Petition for Writ of Mandamus and Prohibition Denied *(by Court)*	
• 3/31/92				Order Granting Injunction and award of sanctions against Tweedy *(by Court)*		
• 4/7/92	Order granting Motion for Sanctions *(by Tenth Circuit)*					

	GRAHAM I	GRAHAM II	GRAHAM III	GRAHAM IV	GRAHAM V	GRAHAM VI
• 4/10/92				Motion for Reconsideration (by Tweedy)		
• 4/20/92	Petition for Rehearing of 4/7/92 Order *(by Tweedy)*					
• 4/24/92	Order Denying Petition for Rehearing *(by Tenth Circuit)*					
• 5/20/92				Order Denying Motion for Reconsideration		
• 5/21/92				Magistrate Judge's Report and Recommendation		
• 5/27/92				Second Motion For Reconsideration (by Tweedy)		
• 5/28/92						Petition for Writ of Mandamus and Prohibition *(by Tweedy)*
• 6/15/92						Petition for Writ of Mandamus and Prohibition Denied *(by Court)*
• 6/15/92				Motion for Citation of Contempt for Failure to Obey Injunction		
• 6/15/92						Motion for Sanctions against Graham & Tweedy *(by A.A.)*

	GRAHAM I	GRAHAM II	GRAHAM III	GRAHAM IV	GRAHAM V	GRAHAM VI
• 6/26/92						Order directing Tweedy to respond to A.A.'s Motion for Sanctions *(by Court)*
• 6/30/92						Petition for Rehearing & Suggestion For *En Banc* Consideration *(by Tweedy)*
• 7/13/92				Order Denying Second Motion for Reconsideration; Motion for Stay; and Affirmed Magistrate's Recommendation		
• 7/13/92				Judgment re Sanctions		
• 8/13/92				Notice of Appeal No. 92-5159 From 3/3/92 Order and From 7/13/92 [sic] Order		
• 8/14/92				Stipulation for Dismissal of Appeal No. 92-5159 as to Graham Only		
• 9/3/92			Order Granting Summary Judgment to American			

	GRAHAM I	GRAHAM II	GRAHAM III	GRAHAM IV	GRAHAM V	GRAHAM VI
• 9/13/92					Denial By Tenth Circuit of Plaintiff's Petition on Rehearing and Suggestion for *En Banc* Consideration	
• 9/15/92				Order Denying Tweedy Rule 59(e) Fed.R.Civ.P., Motion for Relief from July 13, 1992 Judgment		
1993						
• 1/29/93				Order By Tenth Circuit in Appeal No. 92-5159 Dismissing Part of Tweedy's Appeal		

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LILLIAN A. GRAHAM, Plaintiff, vs. AMERICAN AIRLINES, INC., a Delaware corporation, Defendant.	)	No. 86-C-516-C

FINDINGS OF FACT and CONCLUSIONS OF LAW

The above-styled action for discrimination on account of sex predicated on 42 U.S.C. §2000(e) *et seq.*, Title VII of the Civil Rights Act of 1964 came on for nonjury trial. Evidence was presented on May 9 to May 13, 1988, May 16 to May 20, 1988, May 23 to May 24, 1988, March 13 to March 16, 1989, and March 20 to March 22, 1989. Closing argument was held on March 23, 1989. After considering the pleadings, the testimony and exhibits admitted at trial, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following Findings of Fact and Conclusions of Law in accordance with Rule 52, F.R.Cv.P.

FINDING OF FACT

A. Jurisdiction and Venue

1. The alleged acts of employment discrimination upon which plaintiff predicates her action occurred during the years 1984 and 1985.

2. The plaintiff, Lillian Graham (Graham), has filed the following charges of discrimination.

a. March 5, 1985 charge of discrimination filed with Equal Employment Opportunity Commission (EEOC).

b. June 26, 1985 charge of discrimination filed with Oklahoma Human Rights Commission (OHRC).

c. August 22, 1985 charge of discrimination filed with the OHRC.

d. October 1, 1985 charge of discrimination filed with the EEOC.

A notice of right to sue was issued on February 24, 1986. On May 23, 1986, Graham filed her Complaint within ninety (90) days of the notice.

3. The defendant, American Airlines, Inc. (American), is an employer engaged in an industry that affects commerce and employs more than fifteen (15) employees for each working day in each of the twenty (20) or more calendar weeks in the calendar years involved herein. Thus, American was an employer within the meaning of Title VII during the calendar years involved herein.

4. The alleged unlawful employment practices which are the subject of this action were committed in Tulsa, Oklahoma, within the Northern District of Oklahoma.

B. Liability of Defendant American

5. Graham is an adult female and resident of Tulsa, Oklahoma.

6. On July 1, 1968, Graham was employed by American. Graham's employment was subject to the terms of employment appearing on the employment application she signed when she became employed by American. Graham was discharged from American on October 31, 1985 for the stated reasons of insubordination, loafing on the job and failure to cooperate with other employees in violation of Company Rules 7, 12 and 15 and her overall employment record consisting of the following disciplinary actions:

July 17, 1984	C-314	Three-Day Suspension and Warning
June 24, 1985	C-314	Five-Day Suspension and Warning
July 2, 1985	C-314	Warning
Sept 27, 1985	C-314	Eight-Day Suspension and Final Warning

During her employment, Graham was affected by several layoffs due to a reduction in force; therefore Graham was employed by American for a total period of approximately ten (10) years.

7. At all times pertinent to her Title VII claim, Graham was an airplane mechanic at American assigned to the Tulsa maintenance and engineering facility and was a member of the collective bargaining unit represented by the Transport Workers Union of America, AFL-CIO (TWU). Graham's employment with American was governed by the Collective Bargaining Agreement.

8. Under the labor agreement, American recognized the TWU as the sole and exclusive collective bargaining

representative of the employees covered thereby, with respect to wages, hours of employment and other conditions of employment as provided by the Railway Labor Act, 45 U.S.C. §151 *et seq.* Under the labor agreement, American retained the right to the extent not limited or modified by the terms and conditions of the agreement to hire, promote, assign to shifts, maintain discipline and discharge for justifiable cause. American and the TWU further agreed that the agreement contained the whole agreement of the parties as to all existing matters that may be subject to the Collective Bargaining Agreement for the duration of the labor agreement.

9. The arbitrators who heard Graham's grievances are members of the American Association of Arbitrators and were chosen by mutual agreement between American and the TWU.

10. Graham was hired on July 1, 1968 as a junior mechanic in the components/avionics maintenance department. On July 1, 1969, Graham was promoted to a mechanic after passing the qualifying test for electrical instrument overhaul. On August 28, 1970, Graham was laid off due to a reduction in force at American. On September 10, 1970, Graham failed the qualifying test for a gyro instrument overhaul.

11. On September 10, 1973, Graham was recalled from layoff and assigned to the components/avionics maintenance department. On November 11, 1974, Graham was again laid off due to a reduction in force.

12. On February 3, 1977, Graham was recalled from layoff and assigned to the aircraft maintenance department.

13. On July 27, 1977, Graham received a C-314 disciplinary warning for being in the smoking area for an excessive time period in violation of Rule 15 of American's Rules and Regulations preventing loafing on the job. A C-314 Form is used to notify employees regarding disciplinary action up to and including discharge. Graham filed a grievance objecting to the warning. A neutral arbitrator upheld American's disciplinary warning contained in the C-314.

14. On October 18, 1977, Graham received a C-314 disciplinary warning for violating Rule 3, remain in work area. This grievance was denied at the first and second steps. Graham did not pursue the disciplinary warning to arbitration.

15. On June 7, 1978, Graham received a C-314 and a three-day disciplinary suspension without pay for violating Rule 3, remain in work area, and Rule 15, restriction of output. This discipline was upheld in arbitration by the neutral arbitrator.

16. On March 3, 1979, Graham was reassigned within aircraft maintenance from the 707 aircraft to the 747 aircraft. On March 2, 1979, Graham was reassigned from the 747 aircraft to the 707 aircraft.

17. On September 14, 1979, Graham received a C-314 form for violating Rule 3, out of work area, and Rule 15, restriction of output, resulting in Graham's discharge from American. On October 8, 1979, at the request of the TWU, management converted Graham's discharge to a disciplinary suspension and she was reinstated without pay pursuant to an greed [sic] rehabilitation plan.

18. On October 12, 1979, Graham filed an EEOC charge of discrimination based on sex alleging that her discharge was based on sexual harassment. After an on-site investigation of Graham's charge by the EEOC, the EEOC on July 10, 1980 issued a written determination in favor of American.

19. On May 8, 1980, Graham received a C-314 disciplinary warning for violating Rule 22 for receiving a garnishment. The garnishment was later discharged by the court. On July 23, 1980, Graham began a leave of absence for sick leave.

20. On September 2, 1980, Graham returned from sick leave and was assigned to the 747/DC-10 line in aircraft maintenance.

21. On August 28, 1981, Graham was laid off due to a reduction in force. On January 25, 1982, Graham was recalled from layoff and assigned to the 727 line in aircraft maintenance. On September 1, 1982, Graham was reassigned within aircraft maintenance from the 727 to the 747/DC-10 line.

22. On April 26, 1983, Graham received a C-314 and ten-day disciplinary suspension for unsatisfactory job performance due to Graham's failure to connect a pressure line on the aircraft's emergency evacuation equipment which was discovered by the FAA during a surprise inspection at the Los Angeles International Airport. This discipline was upheld in arbitration. Two male mechanics also received C-314's and ten-day and twelve-day disciplinary suspensions, respectively, for the same unsatisfactory job performance. The male supervisor involved received a ten-day suspension.

23. On July 11, 1983, Graham was reassigned (labor loaned) from aircraft maintenance to the JT-3 check and repair shop in power plant maintenance. On October 10, 1983, Graham was reassigned from power plant maintenance back to aircraft maintenance.

24. On March 1, 1984, Graham was reassigned within aircraft maintenance from the 727 line to the 747/DC-10 line at her request.

25. On July 17, 1984, Graham was issued a C-314 and three-day disciplinary suspension for her failure to tighten a "B" nut on an aircraft. Such discipline for a leak found at a leak check was unprecedented at American. Graham filed a grievance protesting this disciplinary action in accordance with labor agreement. The arbitration board upheld American's disciplinary action.

26. On August 2, 1984, Graham was reassigned from the aircraft maintenance department to another department at the American engineering and maintenance base and was permanently restricted from working in the aircraft maintenance department. Graham filed a grievance protesting this permanent restriction on August 3, 1984 which grievance stated in pertinent part:

> On August 2, 1984, I received an AA Form No. 541-3 reassigning me from aircraft maintenance shop 2254-2 to the blade and vane shop, 259-9. I also received a letter from acting aircraft maintenance director, C.L. Harliss, permanently restricting me from working in the aircraft maintenance department.
>
> This is a violation of the TWU-AA Agreement. The company has treated me unjustly, they have harassed, threatened and discriminated against

> me because I am a woman. Therefore, I grieve to be assigned back to the aircraft maintenance, shop 2254-2 immediately. I am qualified to perform this work. Also, I grieve the above mentioned letter be rescinded and removed from all records.
>
> (Defendant's Exhibit 54).

On March 28, 1985, the System Board of Adjustment made the following arbitration award:

> The claim by the union and Ms. Lillian Graham, that she had been subjected to unequal treatment for reason of her sex, in violation of the Agreement's Article 28, is denied.
>
> The claim by the Union and Ms. Lillian Graham that the permanent restriction of her working as an Airline Mechanic in the Aircraft Maintenance Department violated the Agreement, is sustained. The restriction shall be rescinded and job vacancies in the Aircraft Maintenance Department shall be available to her as provided by the Agreement.
>
> (Defendant's Exhibit 58).

27. Field trip hours were to be equalized among the employees under the collective bargaining agreement because field trips were attractive by virtue of the travel and overtime. On December 17, 1984, Graham submitted her AOI requesting her assignment to a scheduled field trip to Wichita, Kansas, and was present when Crew Chief Nevins told Supervisor Barton that if Graham went on the field trip, Barton could get another crew chief to go. On the same day, Supervisor Barton filed his AOI denying Graham's field trip permission because her medical file showed that she was restricted to safety wiring

work because of elbow problems. Graham informed Supervisor Barton that her elbow was no longer a problem. In response and on December 18, 1985, Supervisor Barton conducted a F-29 disciplinary meeting because Graham did certain work on a pump as recommended by another mechanic and suggested a possible suspension. Graham offered to withdraw her field trip request if he would not suspend her. On the same day, December 18, 1984, Graham filed her AIO [sic] withdrawing her request for the field trip and no suspension was imposed.

28. On August 13, 1984, Graham was reassigned within power plant maintenance from the blade and vane shop to the JT-3 check and repair shop. On March 5, 1985, Graham filed an EEOC charge of discrimination based on sex and based on her permanent restriction from working in aircraft maintenance.

29. The Supervisor's Record of Discussion and Action to Graham indicates George Barton counseled Graham about her job performance on several occasions. On May 6, 1985, George Barton gave Graham an overall performance rating which was below average.

30. On June 7, 1985, Graham worked on a fourth stage turbine disk. She reported a dent to her supervisor. On June 24, 1985, plaintiff received a five day suspension without pay. Graham's grievance was denied on September 30, 1985. (Defendant's Exhibit 70). During trial, plaintiff attempted at length to demonstrate (1) the disk on which she was working belonged to American, and was distinct from a disk belonging to Ports of Call, and (2) she did not damage the disk. The Court has concluded that the disk involved was the Ports of Call disk, and that

plaintiff damaged it. Under questions from the Court, plaintiff's memory was unclear as to precisely what happened. (*See* Transcript, Vol.V, pp.486-492). Plaintiff's daughter, Sandra Whiteis, testified at trial that her mother telephoned one day from work, admitting that plaintiff had damaged a turbine disk. Viewing also the testimony of various other eyewitnesses, the Court has concluded that the preponderance of the evidence lies in defendant's favor on this issue.

31. Graham took a one week vacation the next day, June 8, 1985. She travelled to American's headquarters in Dallas, Texas. She sought to report sexual abuse to Vice President Masiello. He told plaintiff to provide the names of offenders and witnesses to her supervisors. On plaintiff's first day back, June 17, 1985, supervisor Barton yelled at her for reporting to Dallas and ordered her to sort out nuts and bolts.

32. Certain records pertinent to the disk discipline were missing. The Court finds that the factual determination can still be made and that American's explanation for the missing records (they were used in arbitration proceedings and apparently misplaced) is plausible. A "scrap tag" produced at trial shows the Ports of Call disk to have been scrapped as useless on May 13, 1985. Viewing the totality of evidence, the Court finds the most plausible conclusion to be that a "5" (representing the fifth month) was written, when a "6" was intended, and that the disk was scrapped on June 13, 1985.

33. On June 24, 1985, Graham received a C-314 and five-day disciplinary suspension for unsatisfactory job performance which was upheld in arbitration. On June

26, 1985, Graham filed an EEOC charge of discrimination based on sex and based on the alleged sexual harassment by her co-workers. When Graham complained in June, 1985, of sexual harassment, American conducted an investigation of her complaints by interviewing those persons who she had named as persons harassing her. While American concluded that no sexual harassment had occurred, American did find that Graham and two male mechanics, Alan Powers and Darrell Martin, had engaged in conduct which violated Rule 31, horseplay, for which Graham, Powers and Martin each received a disciplinary C-314 warning. The C-314 Graham received for violating Rule 31, horseplay, was upheld in arbitration.

34. Graham received her Airframe and Power Plant (A&P) License on July 16, 1985.

35. On August 22, 1985, Graham filed an EEOC charge of discrimination based on sex and based on her five-day disciplinary suspension for unsatisfactory job performance imposed by the June 24, 1985 C-314.

36. On September 26, 1985, Graham did not take her break with the men at 0800 hours but worked for a while and then went to the ladies' rest room and took a 10-15 minute break. While there, Graham read a jewelry brochure with order forms left in the restroom by another employee.

37. On September 27, 1985, Graham received a C-314 and eight-day disciplinary suspension for violating Rule 3, remaining in work area, and Rule 15, restriction of output, which suspension was upheld in arbitration. The infraction citation of September 27, 1985, was based, in part, on information supplied by a female office worker

sent to the women's restroom by Ken Harding of Labor Relations to spy on Graham. On October 1, 1985, Graham filed an EEOC charge of discrimination based on sex and based on the eight-day suspension and alleged bypass for overtime work.

38. On October 31, 1985, Graham was discharged from American pursuant to Form C-314 for violation of Rule 7, 12 and 15 and because of her overall employment record consisting of the following disciplinary actions:

July 17, 1984	C-314	Three-Day Suspension and Warning
June 24, 1985	C-314	Five-Day Suspension and Warning
July 2, 1985	C-314	Warning
Sept 27, 1985	C-314	Eight-Day Suspension and Final Warning

This discharge was upheld in arbitration.

39. The plaintiff has complained that she was assigned undesirable tasks while employed in the JT-3 department such as sorting nuts and bolts, painting equipment, washing airplane engines and filling out paperwork or not rotated on her job assignments because of her sex or in retaliation for her filing EEOC charges. The Court finds that the plaintiff has failed to establish that she was assigned these jobs or not rotated because of her sex or in retaliation for her filing EEOC charges of sex discrimination.

40. The plaintiff also complained that other mechanics took breaks and committed acts of unsatisfactory job performance and were not disciplined. The plaintiff failed to establish that she was treated any differently than any other mechanic.

41. The plaintiff has also complained that she was denied paperwork in violation of FAA regulations or denied documentation which would prove she did not damage a turbine disc because of her sex or in retaliation for her filing EEOC charges. The Court finds that the plaintiff has failed to establish that she was denied paperwork in violation of FAA regulations or denied documentation which would prove she did not damage a turbine disc.

42. The plaintiff complains that she was required to take a qualifying test in order to bid on certain jobs. The defendant, American, established that the requirement that plaintiff take a qualifying test was made only after the company began to hold grave doubts that the plaintiff could perform certain jobs. Further, the defendant had the contractual right to require that the plaintiff take a qualifying test. The Court further finds that plaintiff refused to take a qualifying test. The Court finds that the requirement that plaintiff take a qualifying test in order to bid on certain jobs was not made because of plaintiff's sex, or in retaliation against plaintiff for filing EEOC charges or to harass plaintiff because of her sex.

43. The plaintiff complains that she was the victim of sexual harassment by two mechanics and her crew chief. The Court finds that in June, 1985, after plaintiff had made several allegations of harassment against two

male mechanics, Darrell Martin and Alan Powers, the defendant conducted a thorough investigation of plaintiff's charges. The defendant interviewed each person named by the plaintiff as a person who had either harassed plaintiff or, according to plaintiff, had observed any incident of harassment. While the defendant concluded that no sexual harassment of plaintiff had occurred, American did find that Graham and the two male mechanics, Alan Powers and Darrell Martin, had engaged in conduct which violated Rule 31, horseplay, for which Graham, Powers and Martin each received a disciplinary C-314 warning. Plaintiff's testimony in this regard was not incredible in many respects, but fails to meet the necessary burden of proof standing alone.

44. Most witnesses testified that Graham was an average mechanic. The Court finds from the evidence presented that the plaintiff has established that she was qualified for and able to do the job for which she was discharged.

45. From the admitted facts and evidence admitted at trial, the Court finds that Graham received numerous C-314 disciplinary forms for violations of American's rules and regulations including incidents of unsatisfactory job performance. The supervisor notes also establish that Graham's supervisors counseled Graham on several occasions for poor job performance. The Court finds that Graham was a disciplinary problem. Graham frequently refused to remain in her work area. With only one exception, all the arbitration awards all held that defendant's disciplinary actions of plaintiff were fair, proper and not based on unequal treatment.

46. Graham claimed that American engaged in a pattern of disparate treatment, retaliation and harassment against her because of her gender. The Court fails to discern such a pattern.

47. The Court further finds that male mechanics received similar disciplinary actions for similar violations of American's rules and regulations. The Court finds that no employee with as many C-314's as Graham was allowed to remain employed at American.

48. The Court finds that Graham was not subject to unwelcome sexual harassment. There was conflicting testimony regarding plaintiff's wearing of "suggestive" T-shirts, and engaging in "shop talk" (i.e., using profanity). The Court finds that plaintiff failed to sustain her burden of proof on the issue.

49. The court further finds that as noted before when Graham made her allegations of sexual harassment, her claims were immediately and thoroughly investigated and appropriate action was taken. Graham identified three male mechanics who she alleged sexually harassed her. American concluded after a thorough investigation that while no sexual harassment had occurred, there were instances of horseplay in which Graham herself had engaged. The defendant therefore issued horseplay warnings to Graham and two of the three mechanics. Graham also complained that a newspaper article written about her had been altered by some male mechanics. The written additions ridiculed Graham for poor job performance. The alterations contained no sexual innuendos or vulgarities. When Graham brought the newspaper article to

the attention of defendant, the defendant again thoroughly investigated the matter. Supervisor Barton issued a written warning to the three mechanics thought to be involved stating that any such further conduct could result in further discipline up to and including discharge. Additionally, when Graham complained that an inspector had used vulgar language toward her, the inspector's supervisor issued a written warning to the inspector not to speak to Graham in that manner. The Court further finds that Graham was not prevented from bidding back into aircraft overhaul. To the contrary, Graham could have bid back into aircraft overhaul if she would have passed a qualifying test. American's administration manuals allow management to require a mechanic to take a qualifying test if management doubts a mechanic's skill level to perform a job. The Court notes that the arbitrator who lifted Graham's permanent restriction from aircraft overhaul did not place her back into aircraft overhaul but simply stated that American should allow Graham to bid into aircraft overhaul if she wanted the "risk of failing once again and incurring harsher discipline". (March 28, 1985 arbitration decision by Milt Rubin). The Court finds that American was not restricting Graham from bidding back into aircraft overhaul but rather was simply exercising management prerogative to require Graham to take a qualifying test.

50. The Court further finds that Graham was not passed over for overtime as a result of retaliation. The Court finds that in order to be eligible for an overtime job, a mechanic must have previous experience with that job. The Court finds that Graham had no experience in performing the tasks required for overtime.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

A. Jurisdiction

1. All filing requirements of Title VII of the Civil Rights Act of 1964 as amended in 1972 (Title VII) which are a prerequisite to the jurisdiction of this Court have been satisfied by the plaintiff herein. Title 42 U.S.C. § 2000(e)-5(e)(f)(1).

2. The defendant therein is an employee subject to the provisions of Title VII. 42 U.S.C. § 2000(e)(b), (h).

3. Venue properly lies in this Court. 42 U.S.C. § 2000(e)-5(e)(f)(3).

B. Weight to be Given to the Arbitration Decisions

As noted, with one exception the penalties imposed on plaintiff were upheld in arbitration. It is established that "a court must not give a prior arbitration preclusive effect in a Title VII suit." *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1553 (10th Cir. 1988). However, defendant asks the Court to give great weight to the arbitration decision, based upon factors enunciated in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The court finds this precedent largely inapplicable because in the present record there is only one instance of plaintiff specifically raising a charge of sexual discrimination, as distinct from basic unfairness. A court can accord an arbitral determination great weight when the determination gives full

consideration to an employee's Title VII rights. *Alexander,* 415 U.S. at 60 n.21. Here, there has been an insufficient showing that such full consideration was given. Congress has entrusted the ultimate resolution of discriminatory employment claims to the judiciary. *Darden v. Illinois Bell Tele. Co.,* 797 F.2d 497, 504 (7th Cir. 1986). The Court has determined to give little weight to the arbitration decisions.

C. Plaintiff's Sexual Harassment Claim

In *Meritor Sav. Bank v. Vinson,* 477 U.S. 57 (1986), the United States Supreme Court affirmed the development of a cause of action for "sexual harassment" under Title VII.

Prima Facie Case

In a claim of hostile work environment because of sexual harassment, the employee must prove the following for a prima facie case: (1) that the employee belongs to a protected group; (2) that the employee was subject to "unwelcome" sexual harassment; (3) that the harassment complained of was based on sex; and (4) that the harassment complained of affected a "term, condition, or privilege" of employment. *Sparks v. Pilot Freight Carriers, Inc.,* 830 F.2d 1554, 1557 (11th Cir. 1987). The Court must conclude that plaintiff failed to establish a prima facie case. Testimony of plaintiff's daughter as to statements of plaintiff tends to resolve the conflicting evidence in the conclusion that plaintiff was not subject to "unwelcome" sexual harassment. The Court wishes to make clear that it is viewing the totality of the circumstances. The wearing

of a T-shirt with a "suggestive" phrase or picture on it or the use of profanity is not an invitation to sexual harassment. In the face of conflicting testimony, even assuming *arguendo* that certain instances of touching by co-workers may well have occurred and been unwelcome, plaintiff has not shown that the sexual harassment was sufficiently severe or persistent to affect seriously per psychological well-being. *Sparks*, 830 F.2d at 1561. The sexual conduct was not, from this record, sufficiently pervasive to create a hostile or offensive work environment. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1413 (10th Cir. 1987). Thus, even if the second element of the prima facie case has been established, the fourth has not.

It has also been held that plaintiff must prove employer liability for another employee's actions under agency principles. *See Hicks*, 833 F.2d at 1417-18. One court has stated that

> the ultimate burden of proof is upon the plaintiff to additionally demonstrate respondeat superior liability by proving that the employer, through its agents or supervisory personnel, knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action.
>
> *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 621 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

Plaintiff has also failed to meet this burden of proof. From the record before the Court, those allegations which were made were investigated and admonitions given.

D. Plaintiff's Disparate Treatment Claim

Prima Facie Case

In a discharge case, based on disparate treatment, a prima facie case consists of the following: (1) plaintiff is a member of a protected group; (2) she was qualified for the position from which she was dismissed; (3) she was removed from that position; (4) she was replaced by someone not a member of the protected group. *Whatley v. Skaggs Companies, Inc.*, 707 F.2d 1129, 1135 (10th Cir.), *cert. denied*, 464 U.S. 938 (1983).

The plaintiff herein has made out a prima facie case of discrimination in her termination from employment.

The burden that shifts to the defendant requires defendant to rebut the presumption of discrimination by producing evidence of a legitimate non-discriminatory reason for the discharge of the plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981): "The defendant need not persuade the Court that it was actually motivated by the proffered reasons. (citation omitted). It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* 254-255.

Defendant has met its burden of rebutting the plaintiff's prima facie case of discrimination (assuming the prima facie case has been shown) by articulating a lawful reason for its action, that is, by producing admissible evidence which would allow the Court to conclude that the employment decision had not been motivated by discriminatory animus. *Id.* 257.

The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Texas Department of Community Affairs, supra,* 253. In essence, the burden of the plaintiff "to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a mere pretext for discrimination," merges with the ultimate burden of proving intentional discrimination. *Id.* 253, 256. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 805-06 (1973); *Sabol v. Snyder,* 524 F.2d 1009, 1012-13 (10th Cir. 1975).

It has been held that

> Where, as here, the employer's asserted justification is that the employee violated a work rule, the employee must prove pretext by showing either that she did not violate the work rule or that, if she did, other employees not within the protected class who engaged in similar acts were not similarly treated.
>
> *Sparks,* 830 F.2d at 1563.

Plaintiff has failed to sustain this burden. The Court is persuaded that plaintiff did violate the work rules in question and that other employees who violated the rules were similarly treated. Plaintiff's disparate treatment claim fails.

E. Plaintiff's Retaliation Claim

Although such a claim was not emphasized by plaintiff, defendant has responded in its briefs and proposed findings to a possible retaliation claim.

To establish a prima facie case, plaintiff must show:

1. That she engaged in protected opposition to Title VII discrimination;

2. Adverse action by the employer subsequent to or contemporaneous with such employee activity;

3. A causal connection between the protected activity and the adverse employment action.

Burrus v. United Telephone Co., 683 F.2d 339, 343 (10th Cir. 1982).

While plaintiff demonstrated that she filed EEOC charges and travelled to Dallas to report alleged discrimination (both protected activities), she failed to show a causal connection between her activities and her discharge. Again, the preponderance of the evidence demonstrates that plaintiff's rule violations were the cause of her discharge.

Plaintiff's State Law "Claims"

On March 18, 1987, the Court granted defendant's motion for partial summary judgment as to plaintiff's second cause of action for emotional distress. On April 5, 1988, the Court denied plaintiff's motion to reconsider that Order. During trial, plaintiff made an oral motion pursuant to Rule 15(b) F.R.Cv.P. to add claims for fraud and intentional infliction of emotional distress. The motion was denied. Now, in her post-trial brief, plaintiff repeats the request. For the reasons stated at trial and in the previous Orders mentioned above, the Court again denies the request.

It is the Order of the Court that judgment be entered in favor of defendant and against plaintiff.

IT IS SO ORDERED this 10th day of August, 1989.

/s/ H. Dale Cook
H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LILLIAN A. GRAHAM, Plaintiff,	)	No. 86-C-516-C
vs.	)	
AMERICAN AIRLINES, INC., Defendant.	)	

ORDER

(Filed Dec. 13, 1990)

Before the Court is the motion of the plaintiff to vacate. On August 11, 1989, the Court entered judgment in this Title VII action in favor of the defendant. On August 8, 1990, plaintiff filed the present motion.

Plaintiff expressly states that her motion is made pursuant to Rule 60(b)(3) F.R.Cv.P., which provides authorization to vacate a judgment for "fraud . . . misrepresentation, or other misconduct of an adverse party." *See Anderson v. Dept. of Health & Human Services*, 907 F.2d 936, 952 (10th Cir. 1990). The motion has been made within the one year time limit imposed by the Rule.

Defendant spends some portion of its response brief addressing the distinction between intrinsic and extrinsic fraud. However, Rule 60(b)(3) abolishes that distinction. *Wilkin v. Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973). While some cases have applied the old distinction in an independent action to set aside the judgment (including *Wood v. McEwen*, 644 F.2d

797 (9th Cir. 1981), which defendant cites), they are disapproved. *See* C.Wright & A.Miller, *Federal Practice and Procedure*, §2861 at 196. Consequently, defendant's assertion that perjury or discovery abuse do not permit relief under the Rule is incorrect. Therefore, the Court will consider the plaintiff's assertions without regard to the purported distinction.

To prevail on such a motion, the movant must present clear and convincing proof of fraud, misrepresentation, or misconduct. *Anderson*, 907 F.2d at 952. In her lengthy papers, plaintiff makes wide-ranging accusations of bogus engine records, discovery abuse and perjury. Upon review, the Court finds that the vast majority of these issues were dealt with during the course of the trial, or were previously denied as untimely requests for discovery, *i.e.*, reflecting lack of due diligence in raising the matters. Further, many of these allegations have now been litigated in *Graham v. American Airlines*, 89-C-815-P, an action in which summary judgment has been orally entered in defendant's favor. The errors in records which are reflected do not rise to the level of a "scheme of fraud", as plaintiff alleges. Upon full review, the Court concludes that plaintiff has not sustained her burden of proof.

Although the first paragraph of her brief refers to Rule 60(b)(3), some of the language plaintiff uses indicates that she also seeks to assert "fraud upon the court", which is a separate, albeit nebulous, concept under Rule

60(b).[1] The Tenth Circuit has stated that fraud on the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986). Again, plaintiff has made no such showing.

On November 21, 1990, plaintiff filed an application for leave to file supplemental brief and for limited discovery allowance. The application states that it is made pursuant to Rule 60(b)(2) F.R.Cv.P., *i.e.*, newly discovered evidence. The application is thus made beyond the one-year limitation imposed by the Rule. The Court does not believe that the time limit may be circumvented by attempting to "supplement" a timely filed motion, particularly when the new motion relies upon a different provision of the Rule. Even viewing the motion as timely, the material presented by plaintiff fails to meet the requirements for relief under Rule 60(b)(2). *See Graham v. Wyeth Laboratories*, 906 F.2d 1399, 1416 (10th Cir. 1990); *McCullough Tool Co. v. Well Surveys, Inc.*, 343 F.2d 381, 410 (10th Cir. 1965), *cert. denied*, 383 U.S. 933 (1966). The request for additional discovery is likewise far too late, for the reasons expressed in the Court's Order of May 15, 1989.

It is the Order of the Court that the motion of the plaintiff, Lillian A. Graham, to vacate is hereby DENIED.

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[1] *"Any fraud connected with the presentation of a case to a court is a fraud upon the court, in a broad sense. That cannot be the sense in which the term is used in the final saving clause of Rule 60(b)." Wright & Miller, §2870 at 253. (footnote omitted).*

It is the further Order of the Court that plaintiff Graham's application for leave to file supplemental brief and for limited discovery allowance is hereby DENIED.

IT IS SO ORDERED this 13th day of December, 1990.

/s/ H. Dale Cook

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LILLIAN A. GRAHAM, Plaintiff, v. AMERICAN AIRLINES, INC., et al., Defendants.	)	No. 89-C-815-P (Filed Feb. 21, 1991)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. Introduction

At issue is a motion for summary judgment filed on behalf of defendants American Airlines, Inc. ("American"), George Barton and Dennis Quish. The motion for summary judgment filed by defendant Transport Workers Union of America, Local 514 (the "Union"), which incorporated the arguments, authorities and exhibits submitted by American, is at issue as well.

Defendants seek summary judgment in their favor and against plaintiff on four alternative grounds:

A. This action (hereinafter *"Graham #2"*) is an impermissible collateral attack on the August 11, 1989, final judgment entered in *Lillian A. Graham v. American Airlines, Inc.*, No. 86-C-516-C (N.D. Okla.) (hereinafter *"Graham #1"*);

B. This action is barred by the doctrines of res judicata and collateral estoppel;

C. Each of plaintiff's four claims in this action is legally insufficient; and

d. Plaintiff's claim(s) for breach of contract/ breach of duty of fair representation are barred by the six-month limitations period.

On September 20, 1990, the court entered a minute order striking the trial of this matter and stating that the court would grant summary judgment via a subsequent written order. This is the subsequent written order.

II. Standard for summary judgment

The facts presented to the court upon a motion for summary judgment must be construed in a light most favorable to the nonmoving party. *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). If there can be but one reasonable conclusion as to the material facts, summary judgment is appropriate. Only genuine disputes over facts which might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Finally, the movant must show entitlement to judgment as a matter of law. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985); Fed. R. Civ. P. 56(c).

Although the court must view the facts and inferences to be drawn from the record in the light most favorable to the nonmoving party, "even under this standard there are cases where the evidence is so weak that the case does not raise a genuine issue of fact." *Burnette v. Dow Chem. Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988). As stated by the Supreme Court, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the

Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

The Supreme Court articulated the standard to be used in summary judgment cases, emphasizing the "requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). A dispute is "genuine" "if a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The Court stated that the question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. "The mere existence of a scintilla of evidence in support of the [party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [party]." *Id.* at 252.

Finally, the court determines whether the nonmovant has submitted evidence of the essential elements of the claim by viewing "the evidence presented through the prism of the substantive evidentiary burden" so that a reasonable factfinder could find for the nonmovant. *Id.* at 254.

III. Discussion

A. Background

Plaintiff originally filed this action on September 8, 1989, and filed an amended complaint on May 9, 1990. The gist of this action is that the defendants lied, cheated

and defrauded her during her litigation in *Graham #1* and thereby wrongfully deprived her of a favorable outcome in *Graham #1*.

B. Graham #1

Plaintiff originally sued American on May 23, 1986, asserting a Title VII[1] claim for alleged gender-based harassment and gender-based discrimination, and a pendent state claim for alleged intentional infliction of emotional distress. On March 18, 1987, the court dismissed the pendent state claim, finding the claim was preempted by federal labor law,[2] and on May 4, 1988, the court denied plaintiff's motion to reconsider the dismissal.

The Title VII claim was tried to the court in May of 1988 and March of 1989. The court entered extensive findings of fact and conclusions of law and entered judgment in favor of American and against plaintiff on August 11, 1989.

Plaintiff timely appealed from the adverse judgment. However, she later withdrew her appeal and filed, instead, a motion to vacate the judgment. Plaintiff's motion to vacate, filed August 8, 1990, was denied on December 13, 1990. Her motion to reconsider the denial was denied on January 15, 1991.

During the court of litigation in *Graham #1* plaintiff repeatedly raised the same allegations of fraud, altered or

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[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

[2] The Railway Labor Act, 45 U.S.C. § 151 et seq.

concealed evidence and perjury which she now asserts as the basis of her claims in *Graham* #2. *See* Defendants' Statement of Uncontroverted Facts (Jul. 6, 1990) at Exhibit "1" (tabulation of "facts" asserted in *Graham* #2 and where those "facts" were previously raised by plaintiff and disposed of by the court in *Graham* #1); *see also* Defendants' Appendix (Jul. 6, 1990) at Exhibits 4, 6, 7, 9, 10, 11, 13, 14 and 15 (plaintiff's papers filed in *Graham* #1 that repeatedly raised allegations of fraud, altered or concealed evidence and perjury); *see also* Defendants' Appendix (Jul. 6, 1990) at Exhibits 3, 8, 17 and 18 (orders in *Graham* #1 considering and disposing of the same allegations that plaintiff now asserts as the basis of her claims in *Graham* #2).

C. Graham #2

In *Graham* #2 plaintiff asserts four claims: (1) conspiracy to injure, cheat and defraud plaintiff of her employment and her litigation rights in *Graham* #1; (2) violation of 42 U.S.C. § 1985(3) by conspiring to injure, corrupt and defeat her grievance, arbitration, employment and litigation rights in *Graham* #1; (3) violation of her due process rights by fraudulently and oppressively defeating her grievance, arbitration and employment rights in *Graham* #1; and (4) violation of the public policy of the State of Oklahoma against gender-based harassment and discrimination.

Defendants have submitted to the court, in support of their motion for summary judgment, a tabulation of all the factual allegations that plaintiff asserts to support her four claims in *Graham* #2. *See* defendants' Appendix (Jul.

6, 1990) at Exhibit 1. The tabulation identifies, item by item, each factual allegation made in *Graham #2* and identifies where the item was either ruled on by the court in *Graham #1* or was previously raised in *Graham #1* even if not specifically disposed of by the court. The tabulation is organized into five categories: (1) allegations of false testimony given in *Graham #1;* (2) allegations of acts of conspiracy between American and the Union to commit perjury in *Graham #1;* (3) allegations of alteration or forgery of evidence introduced in *Graham #1;* (4) allegations of missing evidence or concealed evidence relating to the disk discipline; and (5) a table of plaintiff's present objections to findings of fact entered in *Graham #1* on August 11, 1989.

While on the one hand plaintiff freely made allegations of fraudulent conduct on the part of defendants, on the other hand she repeatedly failed to cooperate in discovery when defendants attempted to obtain specific information. *See* Order Compelling Discovery (Apr. 18, 1990); Order Compelling Discovery (Sept. 18, 1990); *see also* Defendants' Motion for Sanctions for Failure to Cooperate in Discovery[3] (Aug. 29, 1990) and Plaintiff's Response (Sept. 14, 1990).

Viewing the evidence through the prism of the substantive evidentiary standard, even with the light shining most favorably on plaintiff, the court concludes plaintiff

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[3] The motion for sanctions in the form of claim preclusion is rendered MOOT by this order.

has failed to put forth sufficient facts from which a reasonable jury could find clear and convincing evidence of fraud. *Anderson*, 477 U.S. at 254.

D. Synopsis of ruling

The court believes summary judgment is warranted in this case on all of the alternative grounds set forth in defendants' motion and brief. However, for the purposes of this order the court concludes it is unnecessary to base its decision on each of the alternative grounds because this action is an impermissible collateral attack on the prior judgment in *Graham #1*, and further because the claims raised in this action either were, or could have been, raised in *Graham #1* and therefore are barred by the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion).

Plaintiff's two response briefs, although replete with allegations of lying, cheating and concealing evidence, are woefully inadequate in responding to defendants' legal arguments.

E. Impermissible collateral attack

Clearly, plaintiff is dissatisfied with the *Graham #1* judgment entered against her on August 11, 1989. Her remedy, however, is not to file an independent action but rather to directly appeal to the United States Court of Appeals for the Tenth Circuit[4] or to file a motion for relief

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[4] The court notes plaintiff initially did lodge an appeal with the Tenth Circuit but later voluntarily withdraw it.

pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.[5] As was stated earlier, and as is clearly manifest from defendants' tabulation of plaintiff's "factual" allegations, in *Graham #2* plaintiff alleges defendants committed perjury in *Graham #1*, conspired to deprive her of her employment and litigation rights in *Graham #1*, altered or forged documents in *Graham #1*, and concealed evidence in *Graham #1*. In sum, in *Graham #2* plaintiff alleges the *Graham #1* judgment against her was obtained by intrinsic fraud, perjury, and by forging or altering evidence. Plaintiff cannot relitigate those issues in an independent action. *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1552 (11th Cir. 1985). Relief from intrinsic fraud must be made by direct attack in the same case in which the fraud was allegedly committed, and a party cannot use an independent action as a vehicle to relitigate issues. *Id.* Plaintiff's allegations of perjury, forged and altered documents, and concealed evidence raise an issue of intrinsic fraud, and do not provide a substantive ground for relief. *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981). "[F]or fraud to lay a foundation for an independent action, it must be such that it was not an issue in the former action nor could it have been put in issue by the reasonable diligence of the opposing party." *Travelers*, 761 F.2d at 1552. Perjury by a party does not meet this standard. *Id.*

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[5] The court notes plaintiff did file a Rule 60(b) motion in *Graham #1* on August 8, 1990. The motion was subsequently denied.

F. Res judicata and collateral estoppel

The doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) also bar this action. These doctrines are similar to each other in that they both seek to bar unnecessary relitigation of issues. They seek to add certainty and finality to the judicial system, to conserve judicial time and resources, to avoid unnecessary litigation expense, and to protect parties from the harassment of never-ending litigation. The doctrines differ, however, in the circumstances under which they may be applied and in their scope. *Ten Mile Industrial Part* [sic] *v. Western Plains Service Corp.*, 810 F.2d 1518 (10th Cir. 1987).

Under the doctrine of res judicata (claim preclusion) "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Id.* at 1522 (quoting *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979)). The doctrine "bars the relitigation of issues that were *or could have been* raised in the first action." *Id.* at 1522-23 (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (emphasis added)).

The four elements that are a prerequisite to the use of the doctrine of res judicata (claim preclusion) to bar a subsequent suit are:

(1) There must have been a final judgment on the merits;

(2) The decision must have been rendered by a court of competent jurisdiction;

(3) The parties, or those in privity with them, must be identical in both suits; and

> (4) The issues in the subsequent suit must be the same issues which were, or could have been, raised in the prior suit.

Id.; I.A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541, 1549 (11th Cir. 1986); *Johnson v. United States,* 576 F.2d 606, 611 (5th Cir. 1978), *cert. denied,* 451 U.S. 1018 (1981). Applying the above-cited law to the facts of this case, the court finds that extensive findings of fact and conclusions of law, together with a final judgment on the merits, were entered on August 11, 1989, in *Graham #1,* in the United States District Court for the Northern District of Oklahoma, a court of competent jurisdiction. The plaintiff was the same in *Graham #1* and *Graham #2.* All the defendants in Graham #2 were also defendants in *Graham #1.* The issues raised in *Graham #2* either were, or could have been, raised in *Graham #1.* Accordingly, the court finds that the doctrine of res judicata (claim preclusion) bars this subsequent action.

Under the doctrine of collateral estoppel (issue preclusion), "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Ten Mile Industrial Park,* 810 F.2d at 1523 (quoting *Allen,* 449 U.S. at 94). The elements of the doctrine of collateral estoppel (issue preclusion) are:

> (1) the issue sought to be precluded in the second suit must be identical to the issue decided in the first suit;
>
> (2) the issue must actually have been litigated in the first suit;

(3) there must have been a valid and final judgment in the first suit;

(4) the determination of the issue must have been material to the prior judgment; and

(5) the party against whom the prior decision is being asserted must have had a full and fair opportunity to litigate the issue in the first suit.

Goss v. Goss, 722 F.2d 599, 604 (10th Cir. 1983); *I.A. Durbin*, 793 F.2d at 1549; *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499 (11th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985). Applying these elements to the facts of the instant case, the court finds that to the extent *Graham* #2 raises issues relating to gender-based harassment or discrimination in plaintiff's employment, all the elements of the doctrine of collateral estoppel (issue preclusion) are met and, accordingly, plaintiff is barred from relitigating those issues.

IV. Conclusion

For the reasons set forth above, defendants American, Barton and Quish's motion for summary judgment, filed July 6, 1990, is **GRANTED**, and defendant Union's motion for summary judgment, filed July 18, 1990, is **GRANTED**. This resolves the lawsuit.

A judgment will be separately filed.

IT IS SO ORDERED THIS 21st DAY OF FEBRUARY 1991.

/s/ L.R. Phillips
LAYN R. PHILLIPS
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LILLIAN A. GRAHAM, Plaintiff-Appellant, v. AMERICAN AIRLINES, INC., Defendant-Appellee.	)	No. 91-5060 (D.C. No. 86-C-516-C) (N.D. Okla.)

ORDER

(Filed April 7, 1992)

Before MOORE and BRORBY, Circuit Judges.

This matter comes before the court on defendant American Airlines' Motion For Sanctions For Filing A Frivolous Appeal. Defendant claims that sanctions are appropriate because Plaintiff filed and dismissed a frivolous appeal and because Plaintiff has engaged in unjustifiable multiplicative litigation.[1]

"To deter frivolous and abusive litigation and promote justice and judicial efficiency, the federal courts are empowered to impose monetary sanctions, by statutes and the rules of civil and appellate procedure as well as their inherent right to manage their own proceedings."

[1] Plaintiff filed this appeal, moved for voluntary dismissal after the parties had briefed a jurisdictional issue raised by Defendant, and the appeal was dismissed as a matter of course.

Braley v. Campbell, 832 F.2d 1504, 1510 (10th Cir. 1987). *See also Christensen v. Ward*, 916 F.2d 1462, 1469 (10th Cir.), *cert. denied*, 111 S. Ct. 559 (1990); *Atkinson v. O'Neill*, 867 F.2d 589, 590 (10th Cir. 1989). Federal R. App. P. 38 authorizes an award of costs and damages, including attorney's fees, for bringing a frivolous appeal. Further, 28 U.S.C. § 1927 provides that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

The record in this case is replete with multiple and vexatious filings by Plaintiff, including a previous appeal to this court filed and voluntarily dismissed by Plaintiff.[2] We have reviewed the record, but Plaintiff's litigation before the district court consisted of filings so numerous and multiplicative that we will not attempt to recap the proceedings. Pursuant to statutory authority, as well as this court's inherent power to deter frivolous and abusive litigation, we have determined that sanctions are appropriate in this case.[3] We remand, however, for the district court to determine the appropriate amount of attorney's fees and costs and how those fees and costs should be apportioned between Plaintiff and her attorney.

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[2] That appeal was dismissed by Plaintiff so that she could relitigate the same issues by yet another procedural means before the district court. Similarly, the current appeal was voluntarily dismissed by Plaintiff so that she could pursue her claims, yet again, in state court.

[3] Plaintiff's counter motion for sanctions is hereby denied.

Defendant's motion is hereby GRANTED, and this case is REMANDED to the district court for proceedings consistent with this order.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN AIRLINES, INC. Plaintiff, v. CRAIG TWEEDY and LILLIAN GRAHAM, Defendants.	)	Case No. 91-C-762-B

ORDER

(Filed July 13, 1992)

This matter comes on for consideration of Defendants' Second Motion For Reconsideration, filed May 27, 1992, of this Court's Order of March 31, 1992, wherein the Court enjoined Defendants Craig Tweedy and Lillian Graham "from proceeding further in the state court proceeding styled ***Lillian A. Graham v. American Airlines, Inc., George Barton, Buck Williams and Wayne Ping, Agent for United Transport Workers Union of America,*** CJ-91-4125, D.C. Tulsa County, State of Oklahoma. These Defendants are further enjoined from instigating, against American and those parties in privy thereto to the claims and issues herein, any further action or proceeding, in either state or federal court or any court or administrative tribunal, on these same claims and/or issues. Any violation of the Court's injunction by either Defendant will subject the violator to appropriate sanctions." Also

included in Defendants' Second Motion For Reconsideration is Defendants' request that the Court "reconsider and vacate its Order of May 21, 1992".[1]

Also, for consideration herein is Defendants' appeal from (objection to) the May 27, 1992 Report and Recommendation of the Magistrate Judge and Defendants' Motion For Stay pending the decision of the Tenth Circuit Court of Appeals in Case No. 92-5107 on the Petition for Writ of Mandamus against Thomas R. Brett, United States District Judge. By Order filed June 15, 1992, the Tenth Circuit Court of Appeals denied Defendants' Petition for Writ of Mandamus on the ground the "[P]etitioners have not satisfied the requirements for invoking mandamus relief." On June 30, 1992, the Clerk of the Northern District of Oklahoma received a copy of Defendants' Petition for Rehearing With Suggestion En Banc in Case No. 92-5107 apparently now pending before the Tenth Circuit Court of Appeals.

The Court is fully familiar with this matter and has carefully examined Defendants' various pleadings in support of their Second Motion For Reconsideration, Appeal from the Magistrate Judge's Amended Report and Recommendation of May 27, 1992, and Motion For Stay, and

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[1] This "Order" is a Report and Recommendation of the Magistrate Judge, recommending that the Court grant American's request for $3,912.01 in fees, expenses and costs against Tweedy. The Magistrate Judge filed an Amended Report and Recommendation on May 27, 1992, recommending the Court grant American's request for $36,421.01 in attorney fees, as well as costs in the amount of $3,912.01, for an aggregate award against Tweedy of $40,333.01.

Plaintiff's responses thereto. The Court concludes Defendants' pleadings essentially re-urge and re-argue the same issues and arguments presented by these Defendants in earlier pleadings. The Court further concludes these Defendants have presented no substantial reasons why this Court should reconsider, vacate and/or modify its previous Order of March 31, 1992. Further, the Court concludes Defendants' appeal from the Magistrate Judge's Amended Report and Recommendation of May 27, 1992, should be denied. Defendants failed to appear at the hearing before the Magistrate Judge held April 28, 1992, nor did Defendants file a response by April 20, 1992 (or at anytime prior to the hearing) relative to excess costs, expenses and attorneys fees incurred in this action as directed by this Court in its Order of March 31, 1992.

The Court further concludes Defendants' Motion For Stay should be denied. Defendants have cited no authority for entering a stay nor offered a bond staying this Court's injunctive relief granted American in its Order of March 31, 1992.

The Court concludes Defendants' Second Motion For Reconsideration should be and the same is herewith DENIED. The Court further concludes Defendants' Motion For Stay should be and the same is herewith DENIED. The Court further DENIES Defendants' appeal of (objection to) the Magistrate Judge's Amended Report and Recommendation of May 27, 1992. The Court herewith affirms and adopts the Magistrate Judge's Amended Report and Recommendation of May 27, 1992.

IT IS SO ORDERED this 13th day of July, 1992.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN AIRLINES, INC. Plaintiff, v. CRAIG TWEEDY and LILLIAN GRAHAM, Defendants.	)	Case No. 91-C-762-B

JUDGMENT

(Filed July 13, 1992)

In accord with the Order entered simultaneously herein, adopting and affirming the Magistrate Judge's Amended Report and Recommendation of May 27, 1992, wherein it was recommended the Court grant Plaintiff's, American Airlines, Inc., request for $36,421.01 in attorneys fees and costs in the amount of $3,912.01, Judgment is herewith entered in favor of Plaintiff, American Airlines, Inc., and against the **Defendant, Craig Tweedy**, in the amount of $36,421.01 for attorneys fees and costs in the amount of $3,912.01, plus post-judgment interest on said amounts at the annual rate of 4.11% from the date hereof until paid.

DATED this 13th day of July, 1992.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN AIRLINES, INC. Plaintiff, v. CRAIG TWEEDY and LILLIAN GRAHAM, Defendants.	)	Case No. 91-C-762-B

NOTICE OF APPEAL

(Filed Aug. 13, 1992)

The Defendants, Craig Tweedy and Lillian Graham, hereby, give notice of their intent to appeal to the United States Court of Appeals for the Tenth Circuit from the Order of March 31, 1992 and from the Order and Judgment of July 14, 1992, and exercise and preserve such statutory right of appeal, under the clear and present threat of contempt for violating the Order of March 31, 1992 by so appealing.

/s/ Craig Tweedy
CRAIG TWEEDY, OBA #9145
Pro Se
202 Wells Building
Sapulpa, OK 74066
918-224-2222
ATTORNEY FOR CO-DEFENDANT
LILLIAN GRAHAM

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of August, 1992, a true and correct copy of the foregoing instrument was deposited in the U.S. Mails, with postage prepaid, and addressed to Reuben Davis and Frederic N. Schneider III, 500 Oneok Plaza, 100 West 5th Street, Tulsa, OK 74103.

/s/ Craig Tweedy

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CRAIG TWEEDY and LILLIAN A. GRAHAM, Appellants,	)	No. 92-5159
vs.	)	
AMERICAN AIRLINES, INC., Appellee.	)	

STIPULATION FOR DISMISSAL

(Filed Aug. 27, 1992)

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties that the above entitled appeal is hereby withdrawn and dismissed with prejudice as to the Appellant, Lillian Graham only. Appellee, American Airlines, Inc., specifically reserves its right to proceed against Craig R. Tweedy with any and all claims, legal actions, judgments and orders, including but not limited to, American's pending claim for sanctions against Craig R. Tweedy. It is further stipulated that the Court's Orders of March 31, and July 14, 1992 shall remain in effect and constitutes the final adjudication of the merits of the instant action. Appellant Graham further stipulates that she will not file any further claims, motions, petitions, or other requests for relief related in any way to the allegations and claims involved in this action.

Appellant Graham further acknowledges that she has executed this Stipulation For Dismissal with prejudice

freely, voluntarily, without any mental or economic pressure, duress or coercion, and only after having had adequate opportunity to fully understand and consider this matter with the assistance of legal counsel of her own free choosing.

DATED THIS 14th DAY OF AUGUST, 1992.

/s/ Lillian Graham
Lillian A. Graham
Plaintiff

/s/ Reuben Davis
Reuben Davis
Frederic N. Schneider III
Boone, Smith, Davis,
Hurst & Dickman
500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000
Attorneys for
American Airlines, Inc.

APPROVED IN OPEN COURT THIS 14th DAY OF AUGUST, 1992.

/s/ John Leo Wagner
UNITED STATES
MAGISTRATE JUDGE

IN THE DISTRICT COURT IN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA

LILLIAN A. GRAHAM, Plaintiff, v. AMERICAN AIRLINES, INC., et al., Defendants.	)	Case No. CJ-91-04125

ORDER

(Filed Sept. 8, 1992)

On the 31st day of August, 1992, there came on for hearing the Defendants' Motion for Summary Judgment and For Sanctions against the Plaintiff, Lillian Graham and her attorney of record, Craig Tweedy. Reuben Davis and Frederic N. Schneider III appeared on behalf of the Defendants. Craig Tweedy appeared in person. Lillian Graham appeared in person pursuant to subpoena issued by Mr. Tweedy. The Court, after hearing argument of counsel, and being fully advised in the premises, finds and enters the following Order:

1. On August 19, 1992, a Stipulation for Dismissal With Prejudice signed by the Plaintiff, Lillian Graham, and American Airlines, Inc. was filed in the case. The Court further finds that the Motion for Summary Judgment filed by the Defendants should be sustained. The Court finds that Defendants' Motion for Sanctions should be denied at this time. The Court will address the issue of sanctions if this matter is reinitiated in this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment be and the same is hereby granted and the matter is hereby dismissed *with prejudice.*

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants' Motion for Sanctions should be and the same is hereby denied at this time. The Court will address the issue of sanctions if this matter is reinitiated in this Court.

DATED this 8 day of September, 1992

/s/ Donald C. Lane
JUDGE OF THE
DISTRICT COURT

APPROVED AS TO FORM:

Craig Tweedy
202 Wells Building
Sapulpa, Oklahoma 74066
(918) 224-2222

/s/ Reuben Davis
Reuben Davis
Frederic N. Schneider III
500 ONEOK Plaza
100 West 5th Street
Tulsa, Oklahoma 74103
(918) 587-0000
ATTORNEYS FOR AMERICAN AIRLINES, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN AIRLINES, INC.	)	
Plaintiff,	)	
	)	
v.	)	Case No.
CRAIG TWEEDY and	)	91-C-762-B
LILLIAN GRAHAM,	)	
	)	
Defendants.	)	
	)	

ORDER

(Filed Sept. 15, 1992)

This matter comes on for consideration of Defendant Tweedy's Motion for Relief From the Court's Judgment of July 13, 1992.

Also for consideration herein is Defendants', Craig Tweedy and Lillian Graham, Motion for Relief From the Court's April 28, 1992 Determination Taxing Costs Against Defendant Graham.

Defendant Tweedy argues the attorneys fee and cost assessment decreed by the July 13 Judgment "is unjustly excessive and awards inappropriate fees and costs." Further, Tweedy argues the "sanction was imposed for a vexatious claim, which claim did not exist until the sanction was imposed on March 31, 1992 (the date of the Court's Order considering and granting American Airlines, Inc.'s request for preliminary and permanent injunctions).

As stated in earlier Orders, the Court is fully familiar with this matter. The Court has carefully examined arguments in support of and in opposition to Defendant Tweedy's Motion for Relief From the Court's Judgment of July 13, 1992. Having made such examination, the Court concludes, as it has in the past, that Defendant's pleadings essentially re-urge and re-argue the same issues and arguments presented in earlier pleadings. The Court further concludes these [sic] Defendant Tweedy has presented no substantial reasons why this Court should reconsider, vacate and/or modify its Judgment of July 13, 1992. The Court finds Tweedy's arguments wholly lacking in merit.

The Court next considers Defendants' Motion for Relief From the Court's April 28, 1992 Determination Taxing Costs Against Defendant Graham[1]. The Court concludes Defendants' appeal from the Court's April 28, 1992 Order taxing costs against Defendant Graham in the amount of $3,877.70, should be denied. As stated in an earlier Order, Defendants failed to appear at the hearing before the Magistrate Judge held April 28, 1992, and did not file a response by April 20, 1992 (or at anytime prior to the hearing) relative to excess costs, expenses and attorneys fees incurred in this action as directed by this Court in its Order of March 31, 1992. Additionally, Defendants failed to seek review of the Clerk's taxation of costs within 5 days of the Clerk's decision, as provided by Rule 54(d), F.R.Civ.P.. Moreover, Defendants did not seek an enlargement of the 5 day requirement. Rule 6(b),

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[1] This determination was made by Clerk of the Court, Richard Lawrence.

F.R.Civ.P. The Court concludes Defendants' Motion for Relief From the Court's April 28, 1992 Determination Taxing Costs Against Defendant Graham is also without merit.

The Court concludes Defendant Tweedy's Motion for Relief From the Court's Judgment of July 13, 1992, and Defendants' Motion for Relief From the Court's April 28, 1992 Determination Taxing Costs Against Defendant Graham, both should be and the same are hereby DENIED.

IT IS SO ORDERED this 15 day of September, 1992.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE: GRIEVANCE AGAINST)
) M-267
CRAIG TWEEDY, ESQ.)

ORDER AND JUDGMENT

(Filed Jan. 15, 1993)

Based upon the Findings of Fact and Conclusions of Law entered this date, it is ORDERED that Craig Tweedy, Esq. Attorney at Law, is suspended from practice before this Court for a period of three (3) years from this date.

IT IS FURTHER ORDERED that any reinstatement shall not be automatic but shall be upon consideration of an application which may not be submitted until the expiration of the three (3) year period of suspension.

DATED this 15th day of January, 1993.

/s/ James O. Ellison
JAMES O. ELLISON,
Chief Judge
UNITED STATES
DISTRICT COURT

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

/s/ H. Dale Cook
H. DALE COOK
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE: GRIEVANCE AGAINST)
) M-267
CRAIG TWEEDY, ESQ.)

ORDER

(Filed Jan. 15, 1993)

A panel consisting of the three District Judges of the Northern District of Oklahoma, Judges Ellison, Brett and Cook conducted a de novo address of the Report of the Admissions and Grievance Committee of this Court regarding the grievance against Craig Tweedy, Esq., Respondent.

The panel conducted a pre-hearing conference with Respondent on October 13, 1992 and a hearing held on December 7, 1992. Respondent was allowed to supplement the record following the hearing.

These proceedings have been made public at the request of Mr. Tweedy.

The Panel has considered the Report and Recommendation of the Admissions and Grievance Committee, together with all documentary evidence, briefs, pleadings, exhibits and all arguments presented to the Panel by the Respondent.

The Panel enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The grievance was filed in October of 1991 against Craig Tweedy, Esq. ("Respondent") by Reuben Davis, Esq., Frederic N. Schneider, III, Esq., Kimberly A. Lambert, Esq. and American Airlines, ("Grievants").

2. The grievance alleges that Respondent engaged in unethical conduct by filing frivolous and vexatious pleadings addressing issues previously adjudicated to final judgment.

3. This Court and the Tenth Circuit have previously sanctioned Respondent for bringing frivolous, vexatious proceedings in the following cases:

   a. *Sooner Products v. McBride,* No. 85-1033 (10th Cir. Apr. 1, 1986). The Tenth Circuit stated:

      > The [District] court found that under 28 U.S.C. § 1986 [sic] and Fed.R.Civ.P., 11, the actions of attorneys Craig Tweedy and [appellants] were vexatious and unreasonable, needlessly multiplying the proceedings and incurring excess costs.
      >
      > * * *
      >
      > Accordingly, we affirm the award of attorneys' fees and costs assessed individually against appellants as a sanction for their abuse of judicial process.

   b. *The Burggraf Corporation v. Goodyear Tire and Rubber, Inc.,* No 90-50-91. (10th Cir. Nov. 21, 1990). The Court held:

> The appeal in the instant case is frivolous in every respect. This is the sixth appeal concerning this case and the second that has been found to be frivolous. It is apparent to this court that Plaintiffs' actions in filing six appeals and making patently frivolous appeals establishes a pattern that cannot be tolerated. It is likewise obvious that Defendants have been put to unnecessary costs, fees and expenses as a result of this appeal. It is therefore ordered that this matter is remanded to the district court for the sole purpose of determining the amount of sanctions to be imposed for the prosecution of this frivolous appeal and determining who should pay the sanctions, i.e., counsel for Plaintiffs, or Plaintiffs, or both.

c. *Graham v. American Airlines,* 731 F.Supp. 1494 (N.D. Okla. 1989).

Graham I

This action was filed by Lillian Graham alleging sex discrimination, sexual harassment and intentional infliction of emotional distress.

Summary judgment was granted in the plaintiff's claim for intentional infliction of emotional distress. The court after a lengthy trial granted judgment in favor of the defendant and against Graham on the Civil Rights claim. One of the principal issues during trial was whether plaintiff had damaged a fourth stage turbine

disk. Defendant produced engine records for the turbine disk. The disk repair became the major issue of the later stage of the trial.

In its Findings of Fact the court found that plaintiff had damaged the disk.

Graham appealed, but later dismissed the appeal and filed a Rule 60(b) motion to vacate the final judgment based on fraud on the court. The fraud alleged was altered and forged engine records and perjury. The court denied the Rule 60b motion.

Graham again filed an appeal which was later voluntarily dismissed. The defendant moved for sanctions which were granted by the Tenth Circuit which stated, inter alia:

> The record in this case is replete with multiple and vexatious filings by Plaintiff, including a previous appeal to this court filed and voluntarily dismissed by Plaintiff. We have reviewed the record, but Plaintiff's litigation before the district court consisted of filings so numerous and multiplicative that we will not attempt to recap the proceedings. Pursuant to statutory authority, as well as this court's inherent power to deter frivolous and abusive litigation, we have determined that sanctions are appropriate in this case.

Graham v. American Airlines, Inc., No. 91-5060 (10th Cir. Apr. 7, 1992) (Ordered granting sanctions).

d. *Graham v. American Airlines*, No. 89-C-815-P.

Graham II

Respondent filed Graham II in state court in 1989 – four weeks after the trial court entered its Findings and Conclusions in Graham I. Defendant removed to this Court. An amended complaint was filed alleging fraud on the Court. The fraud alleged engine record forgery, perjury by defense witnesses and conspiracy.

The Court granted summary judgment to defendant and stated, inter alia:

> Plaintiff's papers filed in *Graham #1* considered and disposed of the same allegations that plaintiff now asserts as the basis of her claim in *Graham #2*.

Graham v. American Airlines, No. 89-C-815-P (N.D. Okl. Sept. 20, 1990) (Order granting summary judgment).

e. *Graham v. American Airlines, et al.*, No. CJ-91-4125 (District Court of Tulsa County, Oklahoma).

Graham III

Within eight months of the summary judgment in *Graham II* Respondent filed *Graham III*. The claim was based on defendant's "frivolous representations" that Graham had damaged the disk in 1988 and "fraudulent concealment" that the disk had been overhauled in 1982 and not in 1985. The claims of *Graham III* were essentially the same as those decided in *Graham I* and precisely those decided in *Graham II*.

American brought an action styled *American Airlines v. Tweedy, et al.*, No. 91-C-762-B seeking injunctive relief

against Tweedy and Graham in order to prevent relitigation of issues previously decided. The injunction was granted and the trial court stated:

> The Court views the pending state court proceeding as essentially vexatious and baseless . . .
>
> One lawsuit to pursue her alleged rights was appropriate. Two lawsuits are inappropriate. Three lawsuits are clearly vexatious.

American Airlines v. Tweedy, et al., No. 91-C-762-B (N.D. Okl. Mar. 31, 1992) (Order granting injunction and award of sanctions). The trial court imposed sanctions, including attorneys fees and costs totaling $40,333.01.

4. Respondent, by his filings and arguments before this Panel has consistently demonstrated an inability to understand closure – the barring of a claim after an adverse decision.

5. Respondent has repeatedly and without justification attempted to relitigate claims after an adverse judgment by claiming fraud on the court.

6. Respondent has brought frivolous and vexatious proceedings in this court.

7. Respondent has pursued a course of conduct which demonstrates a pattern and practice of abuse of legal process prejudicial to the administration of justice.

8. Because of these Findings the Respondent has clearly violated the Oklahoma Rules of Professional Conduct.

CONCLUSIONS OF LAW

1. Any Finding of Fact above which might also be characterized as a Conclusion of Law is incorporated herein.

2. Rule 30, Local Rules for the Northern District of Oklahoma:

> Attorneys practicing in this Court are expected to conduct themselves in accordance with the Model Rules of Professional Conduct of the American Bar Association, as adopted by the Oklahoma Supreme Court as the standard of conduct of all members of the Oklahoma Bar Association. ("Oklahoma Rules of Professional Conduct").

3. Rule 3.1 of the Oklahoma Rules of Professional Conduct provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein unless there is a basis for not doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

4. Rule 8.4 of the Oklahoma Rules of Professional Conduct provides:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

* * *

(d) engage in conduct that is prejudicial to the administration of justice.

5. Local Rule 4(j):

Discipline. Any member of the Bar of this Court guilty of a violation of the prescribed oath of office, or of a violation of the disciplinary rules set forth in the Code of Professional Responsibility of the American Bar Association, or of any conduct unbecoming a member of the Bar of this Court, shall be subject to reprimand, suspension, disbarment, or such other disciplinary action as the Court deems appropriate.

6. The Court concludes Respondent's conduct violated the above-quoted rules. An Order and Judgment directing appropriate punitive action and sanctions against Respondent Craig Tweedy, Esq., shall be filed contemporaneous herewith.

ORDERED this 15th day of January, 1993.

/s/ James O. Ellison
JAMES O. ELLISON,
Chief Judge
UNITED STATES
DISTRICT COURT

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

/s/ H. Dale Cook
H. DALE COOK
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMERICAN AIRLINES, INC., Plaintiff – Appellee,	)	No. 92-5159
v.	)	(D.C. No. 91-CIV-0762-B)
CRAIG TWEEDY, Defendant – Appellant.	)	(N. D. Oklahoma)

ORDER

Filed: January 26, 1993

Before ANDERSON, TACHA, and BRORBY, Circuit Judges.

This appeal is before the court based on a motion by Plaintiff American Airlines to dismiss the appeal for lack of jurisdiction, which contains a request for sanctions against Defendant Tweedy, defendant's response thereto, and the preliminary record on appeal.*

Upon consideration whereof, the portion of Defendant Craig Tweedy's appeal that pertains to the district court judgment entered on July 14, 1992, which awarded

* On September 16, 1992, this court entered an order dismissing the appeal as to Defendant Lillian Graham and granting Defendant Craig Tweedy's motion to withdraw as counsel for Lillian Graham.

plaintiff attorney fees and costs against defendant, is dismissed for lack of appellate jurisdiction. The August 13, 1992 notice of appeal was filed while a timely combined motion under Fed. R. Civ. P. 59(e) for relief was pending before the district court. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982); *Dalton v. First Interstate Bank of Denver*, 863 F.2d 702, 703-704 (10th Cir. 1988); *Skagerberg v. Oklahoma*, 797 F.2d 881, 883 (10th Cir. 1986).

Upon further consideration, the court reserves judgment on the remaining jurisdictional issue contained in the motion to dismiss. The remaining jurisdictional issue, the motion to dismiss, and the response in opposition are referred to the panel selected to dispose of this appeal.

Briefing on the merits may proceed. Defendant Craig Tweedy's opening brief and appendix shall be served and filed 40 days after the date on this order. Subsequent briefing shall proceed in accordance with 10th Circuit Rules of Court.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk